Kellogg Company *and* Bakery, Confectionary, Tobacco Workers and Grain Millers International Union and Its Local Union 252-G. Case 15–CA–115259

May 7, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On August 7, 2014, Administrative Law Judge Ira Sandron issued the attached decision. The General Counsel and the Union each filed exceptions and a supporting brief, the Respondent filed answering briefs, and the Union filed a reply brief. In addition, the Respondent filed cross-exceptions and a supporting brief, the General Counsel and the Union each filed an answering brief, and the Respondent filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order, to amend his remedy, and to adopt his recommended Order as modified and set forth in full below.[3]

I. INTRODUCTION

This case arose in the context of negotiations between the Respondent, Kellogg Company, and the Charging Party, Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 252-G (Local 252-G or the Union), for a successor supplemental collective-bargaining agreement at the Respondent's ready-to-eat cereal plant in Memphis, Tennessee. The principal issue presented is whether the Respondent lawfully insisted to impasse on proposals to modify the expired Memphis supplemental agreement, or whether it violated the Act by insisting to impasse on, and locking out employees in support of, proposals that effectively sought to modify the separate master collective-bargaining agreement covering four of the Respondent's plants, including the Memphis plant. At issue are the Respondent's proposals that "any employee hired . . . to perform . . . bargaining unit work" be classified as a "casual employee" excluded from the wage rates, benefits, and overtime premiums granted to regular employees under the master agreement.

The General Counsel alleges that the Respondent's proposals would constitute midterm modifications of the wage and benefit provisions of the existing master agreement pertaining to regular employees, and that they are therefore nonmandatory subjects of bargaining over which the Respondent could not lawfully insist to impasse or lock out the unit employees. The judge, focusing on the proposals' use of the term "casuals," agreed with the Respondent that the proposals would not have modified any master agreement provisions pertaining to regular employees. He therefore dismissed the allegations. The General Counsel and the Union except, arguing that the Respondent's proposals concerned casual employees in name only, and that they were in reality an attempt to modify the economic terms for regular employees covered by the master agreement. We agree, as explained below. We therefore reverse the judge's dismissal of these allegations and find that the Respondent violated Section 8(a)(5) and (1) of the Act by insisting to impasse on proposals that would constitute midterm modifications of the existing master collective-bargaining agreement and were therefore nonmandatory subjects of bargaining. We further find that the Respondent violated Section 8(a)(1) of the Act by threatening to lock out the employees unless the Union acceded

[1] We deny the Respondent's request for oral argument, as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The Respondent argues that the Board lacked a quorum at the time it approved the designation of the former Memphis, Tennessee Regional Office as a Subregion of Region 15 and, therefore, the Regional Director for Region 15 lacked authority to issue the complaint in this matter, which arose from events that occurred at the Respondent's Memphis plant. See *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). We find no merit in this contention. As an initial matter, Kathleen McKinney was appointed as the Regional Director for Region 15 in 2008, and that appointment is not challenged. Further, to the extent the Respondent's argument is based on the expansion of Regional Director McKinney's casehandling authority to include the geographic area covered by the Memphis office, the Board on July 18, 2014, in an abundance of caution and with a full complement of five Members, ratified nunc pro tunc and expressly authorized all administrative and personnel actions taken during the time it lacked a quorum, including the restructuring of the Regional Offices. Finally, it is well established that when a Regional Director or other designated Board agent issues a complaint, she acts for, and with authority delegated by, the General Counsel. *Pallet Coms.,* 361 NLRB No. 33 (2014). Accordingly, we find that the complaint was validly issued.

[2] We adopt the judge's finding, for the reasons set forth in his decision, that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to provide presumptively relevant information requested by the Union regarding job bidding.

[3] We shall amend the judge's conclusions of law and remedy, modify his recommended Order, and substitute a new notice to conform to the violations found.

to its unlawful bargaining demands and violated Section 8(a)(5), (3), and (1) by thereafter locking out over 200 bargaining unit employees.[4]

II. FACTS

A. The Bargaining Relationship

Since 1958, four different local unions of the Bakery, Confectionary, Tobacco Workers and Grain Millers International Union have represented separate units of employees at the Respondent's ready-to-eat cereal plants in Battle Creek, Michigan; Omaha, Nebraska; Lancaster, Pennsylvania; and Memphis. The employment relationship at each location is governed by two collective-bargaining agreements: a master agreement between the Respondent, the International Union, and the local unions, which covers all four plants, and a separate supplemental agreement between the Respondent and the local union at each respective plant. The most recent master agreement is effective until October 3, 2015 (the Master Agreement). The most recent Memphis supplemental agreement expired on October 20, 2013 (the Supplemental Agreement).

B. The Master Agreement

The Master Agreement establishes uniform wages, benefits, and overtime premiums for regular employees at the four plants. Section 5.01 of the Master Agreement explicitly states, "[a]ll matters pertaining to hourly wages . . . are included as part of this Agreement and are contained in the Wage Appendix, which is contained in this Master Agreement." The Wage Appendix includes a detailed Cost-of-Living Adjustment (COLA) calculation and adjustment table and establishes a "New Hire Progression Schedule" that provides a 4-year track for new regular employees to attain 100 percent of the applicable base job rate and COLA.[5] The Wage Appendix includes an exception from the new hire wage schedule for "work performed by non-regular employees, such as temporary and casual employees" and specifies that they are to be paid "[a] rate of $6.00/hour less than job rate."

The Wage Appendix also grants regular employees overtime premium pay, including overtime for all hours worked in excess of the normal workday (8 hours) and for Saturday hours (or, in departments that operate 7 days a week, an employee's first scheduled day of rest) and double time for all Sunday hours (even if Sunday is not a scheduled day of rest). Other provisions of the Master Agreement guarantee regular employees certain benefits, including, among other things, vacation; medical, dental, and disability insurance; and pension. The Master Agreement contains explicit prohibitions against negotiating provisions in supplemental agreements that conflict with the Master Agreement.[6]

During negotiations for the Master Agreements in 2005, 2009, and 2012, the Respondent attempted to obtain concessions in the wage, benefit, and overtime premium provisions for regular employees. In 2005, the Respondent proposed that new regular employees permanently receive: (1) reduced wages; (2) reduced benefits, including in vacation, sick and accident pay, supplemental work injury pay, life insurance, health insurance, and pension; and (3) no Sunday double-time premium for employees working an alternative (7-day) schedule, unless Sunday was a regularly scheduled day of rest. The Respondent also proposed that the parties negotiate a Memorandum of Agreement (MOA) establishing an alternative schedule, in order to reduce Saturday and Sunday premium pay. The Respondent further proposed that the parties negotiate a MOA concerning the creation of a permanent, lower-paid "Qualified Casual Workforce" to be used throughout the four plants. The Unions rejected these proposals, but agreed to maintain a reduced wage rate for regular employees for an additional year, with the result that new employees would pro-

[4] On July 30, 2014, the United States District Court for the Western District of Tennessee issued a temporary injunction under Sec. 10(j) of the Act, ordering the Respondent to, inter alia: cease and desist from insisting to impasse on proposals that are nonmandatory subjects of bargaining, threatening to lock out employees in furtherance of such proposals and locking out employees; recognize and bargain in good faith with the Union; and offer full interim reinstatement to the locked out employees. *McKinney v. Kellogg Co*., 33 F.Supp.3d 937 (W.D. Tenn. 2014). By order dated October 2, 2014, the court denied in part the Respondent's motion to dissolve, modify, or stay the injunction. 2014 WL 4954351 (W.D. Tenn. 2014).

[5] Prior to 1978, wages were bargained locally. Beginning in 1978, although job classifications and wage schedules continued to be recited in the separate supplemental agreements for each plant, those classifications and wage schedules were incorporated by reference in the master agreements, and all across-the-board adjustments to wages have been negotiated at the master level since that time. Adjustments in the wage rate for individual job classifications continue to be negotiated locally.

[6] Under "Scope of Agreement" sec. 1.01, the Master Agreement provides:

> (c) This Agreement shall cover only those matters specifically included herein; and in the event that any provision of any of the Supplemental Agreements is in conflict with any provision of this Agreement, the provision of this Agreement shall prevail.
>
> . . . .
>
> (f) Those matters which have been covered by provisions in this Agreement shall not, unless the parties thereto agree, be subject to negotiation between the Company and any of the respective Local Unions in an effort to secure changes in or to secure a new Supplemental Agreement. Those matters covered by provisions in a Supplemental Agreement shall not, unless the parties thereto agree, be subject to negotiation between the Company and the International Union in an effort to secure changes in or a new version of this Agreement.

gress to 100 percent of the basic wage rate and COLA in 4 years, rather than the then-existing 3-year progression.

During discussions preliminary to formal negotiations in 2009 and 2012, representatives of the Respondent stated that they wanted to explore again the concessionary proposals the Respondent had submitted in 2005. The Unions indicated that they would consider such proposals only if the Respondent agreed to job security enhancements. The Respondent thereafter dropped these subjects, except for the Sunday double-time premium. The Respondent included in its formal written proposals in 2009 and 2012 a provision to eliminate the Sunday double-time premium unless Sunday was a regularly scheduled day of rest. The Respondent's chief negotiator explained in 2012 that, in the Respondent's view, it had the right to convert to a continuous 7-day schedule under existing language in the Master Agreement, but doing so would not make economic sense unless the master provision requiring double time for all Sunday hours was modified. The Unions rejected the proposals, and they were not included in the 2009 or the 2012 master agreement.[7]

C. The Memphis Supplemental Agreement

The most recent Memphis Supplemental Agreement was effective from October 22, 2010, to October 20, 2013. The 2010–2013 Supplemental Agreement was the first local contract in Memphis to address the use of casual employees. Section 107 of the Supplemental Agreement, titled "Casual Program," states that the purpose of the program is "to provide regular employees with relief from extended work schedules through the use of Casual employees." Section 107 imposes a 30-percent (of all Memphis employees) cap on the number of casual employees, and states that they cannot be used when regular employees are on layoff, or before overtime is offered to and refused by all regular employees (with five exceptions). Section 107 further provides that the terms and conditions of the Supplemental and Master Agreements do not apply to casual employees, and the only fringe benefits they are entitled to receive are uniform and shoe subsidies, break and lunch periods, and shift differentials; they cannot accumulate seniority or grieve the discontinuation of their employment; their maximum wage rate is 80 percent of the applicable job rate; and they are eligible for overtime after 40 hours worked in the workweek.

Between 2010 and 2013, about 20 casuals were hired in Memphis. At the time the Supplemental Agreement expired, no casuals were employed, and the bargaining unit consisted of approximately 200 regular employees.[8]

D. Negotiations for a Successor Supplemental Agreement, Impasse, and Lockout

The Respondent and Local 252-G commenced negotiations for a successor Supplemental Agreement on September 17, 2013, and they met 13 times over a period of 4 weeks.[9] At the first negotiating session, the Respondent announced that the Memphis plant was "at risk" and needed to "fix labor costs" in order to "build a sustainable model." The Respondent went on to propose extensive changes to the Supplemental Agreement. Most of the substantive changes related to what the Respondent termed an "expansion" of the casuals program. As relevant here, the Respondent proposed that the term "casual employee" be redefined to mean "any employee hired by Kellogg to perform production or any other bargaining unit work" and that there be no limits on its right to hire and use casuals. The proposal also provided that casuals would be required to serve a probationary period, and would be granted seniority, job bidding rights, and the same grievance rights as regular employees. However, casuals would continue to be paid at a lower wage rate than regular employees ($6 an hour less than the applicable job rate, consistent with the Master Agreement) and to be excluded from major benefits, including health and other insurance benefits.

When questioned about the details of the proposals concerning casuals, the Respondent's chief negotiator, Christine Chorny, stated that going forward, all new hires would be casual employees, but that the Respondent was not precluding the later hiring of regular employees if necessary because of market conditions. She later acknowledged, however, that under its proposal, the Respondent would never have to hire another regular employee, and it could lay off regular employees and bring them back as casuals.

As part and parcel of its casuals proposals, the Respondent also introduced a provision that would give it

[7] The parties entered into a MOA in 2012 to "discuss scheduling issues" at a future Union Advisory Committee (UAC) meeting. Only one UAC meeting has been held since that time, and the parties did not discuss scheduling.

[8] As described in greater detail in the judge's decision, the Lancaster, Battle Creek, and Omaha supplemental agreements also contain provisions addressing the use of casuals. Although the terms of the agreements vary, they all state that the purpose of the casual program is to provide relief to regular employees from extended work schedules, and they all include caps and other limitations on the use of casuals (or seasonal as they are referred to in the Omaha Supplemental Agreement).

[9] All dates hereafter are in 2013, unless otherwise indicated.

the right to establish an alternative crewing schedule.[10] The proposal specified that casual employees working such schedules would be excluded from the daily overtime and Sunday double-time premium pay provisions of the Master Agreement.[11]

The Respondent's casuals and alternative crewing proposals quickly emerged as the primary points of dispute in the negotiations. At the first negotiating session, Chorny stated that the Respondent wanted to "redo the Casual employee to make them the employee of the future." Anthony Shelton asked, "You pay them less?" and Chorny responded, "Yes." Chorny subsequently explained, at the September 26 session, that the Respondent was "trying to establish a cost model that would not hurt the business with the Casual being the new workforce." She then said that the new work force would be "basically like a new hire is today," but "with the pay rate for Casuals that has already been negotiated." She continued by stating: "[Regular employees] enjoy great pay and great benefits . . . . I'm not saying it is wrong, we agreed to that in prior negotiations . . . . But moving forward that does not work and we are trying to do something about it." Local 252-G President Kevin Bradshaw responded:

> [Y]ou agreed to it for a reason. Now you are saying . . . you can't afford it. Those are things you negotiate at the master level. You are trying to force this on us and we said we would not discuss [it].

At the October 9 session, Chorny reiterated that "the Casual of today is no longer what we are talking about. The Casual of tomorrow will be different, they will have seniority rights, a probationary period, job bidding like a Regular employee [but] they will be at the negotiated rate for a Casual allowed in the Master." Objecting to Chorny's use of the term "casual," Shelton stated: "[J]ust call them employees. You are double talking, they are just employees." Later during that session, Chorny added: "[P]eople are thinking of a Casual how it used to be. We are blowing that out of the water."

Shelton opened the final negotiating session on October 15 by stating that the Respondent's casual and alternative crewing proposals were the only issues left to discuss. Chorny agreed. Shelton then reiterated the Union's position that those topics were appropriately bargained only at the master level, and that the Respondent had unsuccessfully tried to get the proposals included in the Master Agreement and was now trying to get them into the Supplemental Agreement.

With the parties admittedly at impasse, the Respondent provided its "Last/Best Offer" to the Union on October 16, along with notice that the Respondent planned to lock out the unit employees. On the same date, the Respondent informed the unit employees that it would lock them out if its offer was not accepted by October 22. By letter dated October 21, the Union rejected the Respondent's Last/Best Offer. On October 22, the Respondent locked out all of the approximately 200 bargaining unit employees.

E. Judge's Decision

The judge recommended dismissal of the complaint allegations that the Respondent unlawfully insisted to impasse on its casual and alternative crewing proposals and unlawfully threatened to lock out and locked out employees in furtherance of the proposals. The judge framed the legal issue as follows:

> The issue before me is whether the proposals were proposed modifications to the master agreement, and therefore midterm modifications over which the Union had no obligation to bargain, or were proposals going to the renegotiation of the local agreement [Supplemental Agreement] and therefore mandatory subjects of bargaining. The answer determines the legality of the Company's declaration of impasse, letter to employees, and subsequent lockout.

The judge stated, "[t]here is no question that if the master agreement covered the subjects that the Respondent's proposals sought to change . . . then those proposals sought midterm modifications, for which the Union was not required to bargain, and over which the Respondent could not declare an impasse when the parties failed to reach agreement thereon." However, he found that "use of casual employees, and their terms and conditions of employment, has been primarily a matter for local negotiations throughout the years," and that the only provision in the Master Agreement concerning casuals was their wage rate—which the Respondent did not seek to change. The judge further found that "alternative crew scheduling has been tacitly recognized as a subject for local bargaining, even though it may overlap with provisions in the master relating to overtime." The judge concluded, "the Respondent's proposals for an expanded casual employees program and for alternative crewing were topics that came under the local agreement, and

[10] The Respondent's negotiator, Rachel McConnell, stated that the Respondent's proposals on casuals and alternative crewing "are one and the same to us. If we do not have an alternative crew schedule, there would be no need for casuals. You get to the alternative crewing with casuals being able to work."

[11] Regular employees assigned to an alternative crewing schedule would continue to receive time-and-one-half for all hours worked in excess of the normal 8-hour workday and on their first scheduled day of rest in a workweek, and double time for all Sunday hours as required by the Master Agreement.

not proposals for midterm modifications of the master agreement. Therefore, they were mandatory subjects of bargaining in the 2013 Memphis local negotiations." The judge further concluded that the Respondent properly declared impasse and legally locked out the unit employees.

III. ANALYSIS

A. Impasse

Section 8(d) of the Act defines the obligation to bargain with respect to wages, hours, and other terms and conditions of employment, but states that "the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." 29 U.S.C. § 158(d). Hence, when a collective-bargaining agreement is in effect, a party is under no obligation to consent to, or even discuss, proposed midterm modifications of a contractual term, unless the agreement contains a reopener provision. *Smurfit-Stone Container Enterprises*, 357 NLRB No. 144, slip op. at 2 (2011), enfd. sub nom mem. *Rock-Tenn Services, Inc. v. NLRB,* 594 Fed. Appx. 897, 2014 WL 6657651 (9th Cir. 2014). The Board has held, moreover, that a proposal to modify a contract midterm is a nonmandatory subject of bargaining, and as such it cannot be insisted on as a condition for reaching agreement on mandatory subjects. Id. Accordingly, a party who insists to the point of impasse on a nonmandatory subject violates Section 8(a)(5) and (1) of the Act. Id.; *Chesapeake Plywood, Inc.*, 294 NLRB 201, 201 (1989), enfd. mem. 917 F.2d 22 (4th Cir. 1990). See generally *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 347–349 (1958).

Here, the judge, focusing on the Respondent's use of the term "casuals" in its proposals to describe new hires, found that the proposals would not have modified provisions in the Master Agreement pertaining to regular employees. In our view, however, the judge misperceived the impact of the proposals, which was to permit the Respondent to cease hiring all regular employees in the future and replace them with lower paid "casual" employees. This objective was revealed in Chorny's statement that "[Regular employees] enjoy great pay and great benefits. . . . But moving forward that does not work and we are trying to do something about it." The Respondent therefore proposed a total replacement of regular employees with "casuals," whom Chorny referred to as "the employees of the future."

While the Respondent contended that it was merely seeking to expand the casual employee program existing in the Supplemental Agreement, the casuals of the Respondent's proposals would be very different from those in the Supplemental Agreement. Indeed, virtually the only thing tying the two together would be their title. The existing casuals are intermittent, part-time workers whose purpose is to provide relief to regular employees from extended work schedules. The Respondent's proposals, however, would "blow[] that out of the water" by supplanting regular unit employees with casuals who would serve a probationary period and be accorded seniority and job bidding rights. In short, as Chorny acknowledged, the Respondent's proposals would effectively change the definition of casuals to "basically [what] a new hire is today," but "with the pay rate for Casuals that has already been negotiated." The Respondent thus sought to retain all of the traditional attributes of regular employees that benefit it the most—, i.e., having a stable, core work force of full-time, permanent employees available to meet its regular day-to-day needs—while instituting across-the-board cuts to the wages and benefits that were bargained for newly hired regular employees in the Master Agreement.

As discussed, the Respondent had repeatedly sought similar across-the-board reductions in master negotiations. During the 2005 master negotiations, the Respondent proposed that new regular employees receive permanently reduced wages and benefits, and that it have the right to modify the schedule in order to reduce weekend premium pay. The Respondent made similar proposals during the 2009 and 2012 negotiations, but the parties never agreed to implement them as part of the Master Agreement. The unavoidable inference is that by insisting that "any employee hired . . . to perform production or any other bargaining unit work" receive the reduced wages and benefits negotiated for casual employees, the Respondent was attempting to force the modifications in the wage and benefit provisions of the unexpired Master Agreement that it tried unsuccessfully to obtain in the 2005, 2009, and 2012 master negotiations.

It is true, as found by the judge, that the Master Agreement does not guarantee regular employees any minimum hours of work, overtime, or particular schedules. However, the language of the Master Agreement and the bargaining history make patently clear that the parties, in entering into the Master Agreement, intended that the Respondent's core work force of permanent full-time employees receive the wages, benefits, overtime, and premium pay negotiated for regular employees. It is also clear that the parties intended the $6 hourly wage rate reduction to apply only to "non-regular employees,

such as temporary and casual employees," used to supplement the Respondent's core work force.[12] The implementation of the Respondent's proposals would stand that model on its head and effectively alter the Master Agreement's wage rates and benefits for newly hired regular employees. Thus, by relabeling new full-time permanent employees "casuals," the Respondent sought to circumvent the economic terms of the Master Agreement pertaining to regular employees, in order to take advantage of the $6 hourly wage rate reduction intended solely for "non-regular employees." The Respondent cannot use such creative semantics to force the Union to accept midterm changes in the terms and conditions established in the Master Agreement.

For the above reasons, we find that the Respondent's casual and alternative crewing proposals would have modified the wage, benefit, overtime, and premium pay provisions of the Master Agreement applicable to new and returning regular employees.[13] Accordingly, we reverse the judge and find that the Respondent violated Section 8(a)(5) and (1) of the Act by insisting to the point of impasse on these proposals. *Smurfit-Stone Container*, supra, 357 NLRB No. 144, slip op. at 2.[14]

B. Lockout

A bargaining lockout is permissible only if it is "for the sole purpose of bringing economic pressure to bear in support of [an employer's] legitimate bargaining position." *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965); *National Extrusion & Mfg. Co.,* 357 NLRB No. 8, slip op. at 4 (2011), enfd. sub nom. *KLB Industries, Inc. v. NLRB*, 700 F.3d 551 (D.C. Cir. 2012). A lockout undertaken to compel acceptance of midterm contract modifications is not undertaken in support of legitimate bargaining objectives, and therefore violates Section 8(a)(5) and (1) of the Act. *Rangaire Co.*, 309 NLRB 1043, 1050 (1992), affd. mem. 9 F.3d 104 (5th Cir. 1993) (employer violated 8(a)(5) and (1) by locking out employees to compel the employees and union to consent to midterm contract modifications).

The Board has also held that an employer violates Section 8(a)(3) and (1) of the Act by locking out employees in order to avoid the duty to bargain or to compel acceptance of an unlawful bargaining position. See *Royal Motor Sales*, 329 NLRB 760, 777 (1999), enfd. sub nom. *Anderson Enterprises v. NLRB*, 2 Fed. Appx. 1 (D.C. Cir. 2001) (employer violated 8(a)(3) and (1) by locking out employees in order to pressure them to accept the unlawful preimpasse implementation of the employer's final offer); *D.C. Liquor Wholesalers*, 292 NLRB 1234, 1237 (1989) (employers violated 8(a)(3) and (1) by locking out employees in an attempt to coerce acceptance of the employers' unlawfully implemented final offer), enfd. sub nom. *Teamsters Local 639 v. NLRB*, 924 F.2d 1078 (D.C. Cir. 1991).[15]

In the present case, the Respondent sent notices to the Union and to the unit employees warning that unless its Last/Best Offer was accepted, the employees would be locked out. When the Union rejected that offer, the Respondent locked the employees out, as promised. The lockout was therefore clearly intended to compel acceptance of the Respondent's bargaining position, including its proposals on casuals and alternative crewing. Because those proposals would have constituted midterm modifications of the Master Agreement, they do not qualify as a "legitimate bargaining position" that the Respondent could lawfully pursue through the use of a

[12] In agreement with our concurring colleague, we find that the phrase "casual employees" as used in the Master Agreement is not ambiguous, and we apply its ordinary meaning in the absence of any other definition contained in the Master Agreement or bargaining history indicating that the parties intended to utilize the phrase differently.

[13] Our analysis of this issue is not based on our subjective view of the value or efficacy of the Respondent's proposals or on our own views of a desirable settlement in contravention of the Supreme Court's holding in *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), as our concurring colleague asserts. Rather, we have applied longstanding rules governing the bargaining *process*, which require parties to negotiate without insisting to impasse on midterm modification of an existing agreement. Hence, our decision furthers the central purpose of the Act: to promote industrial peace by encouraging good-faith collective bargaining.

[14] The Respondent contends that the Board should apply the "clear and unmistakable" waiver analysis to determine whether the Respondent retained the right to bargain over its casual and alternative crewing proposals at the local level. We agree with the judge that the Respondent's waiver argument is without merit. The waiver analysis only applies where there is a statutory right to bargain. However, Sec. 8(d) makes clear that there is no statutory right to bargain over midterm modifications of a collective-bargaining agreement. Rather, under Sec. 8(d), parties have the right *not* to bargain over, or even discuss, proposed midterm modifications of a contractual term. Only an express agreement to reopen the terms of a collective-bargaining agreement suffices as a waiver of that right. "Absent an express reopener, neither the union nor the employer ever waives the statutory right to refuse to consider . . . changes in the collective bargaining agreement while the agreement is still in force." *Standard Fittings Co. v. NLRB*, 845 F.2d 1311, 1316 (5th Cir. 1988).

We further find that the Respondent's reliance on cases such as *Bath Iron Works Corp.*, 345 NLRB 499 (2005), enfd. 475 F.3d 14 (1st Cir. 2007), to assert that this case is solely one of contract interpretation, and thus inappropriate for resolution by the Board, is misplaced. The principal question in this case does not turn on conflicting interpretations of ambiguous contract language, but on whether the Respondent's proposals would have modified the Master Agreement.

[15] See also *Clemson Bros.*, 290 NLRB 944, 945 (1988) ("it is the Respondent's avoidance of its bargaining obligation in instituting the lockout . . . which renders the lockout violative of Section 8(a)(3) and (1)"); *American Stores Packing Co.*, 158 NLRB 620, 623 (1966) (a lockout that is intended to coerce employees to compel acquiescence in the employer's unlawful bargaining position violates 8(a)(3) and (1)).

lockout. The Respondent thus violated Section 8(a)(5) and (1) of the Act by locking out its employees. We find, moreover, that the lockout had a coercive effect on employees' exercise of their Section 7 rights because they would have reasonably perceived it as retaliation for the insistence of their bargaining representative on good-faith collective bargaining. We therefore find that the Respondent violated Section 8(a)(1) of the Act by threatening to lock out the unit employees if the Union did not accede to its unlawful bargaining demands and violated Section 8(a)(3) and (1) by thereafter locking out the employees.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for the judge's Conclusion of Law 3.

"3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act."

2. Insert the following as Conclusions of Law 4, 5, 6 and 7:

"4. The Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide Local 252-G with information on job bidding that it requested on October 10, 2013.

"5. The Respondent has violated Section 8(a)(5) and (1) of the Act by insisting to the point of impasse that Local 252-G consent to midterm modifications of the parties' 2012–2015 Master Agreement.

"6. The Respondent has violated Section 8(a) (1) of the Act by threatening to lock out employees in order to compel acceptance of its unlawful bargaining demands.

"7. The Respondent has violated Section 8(a)(5), (3), and (1) of the Act by locking out employees in order to compel acceptance of its unlawful bargaining demands."

AMENDED REMEDY

In addition to the remedies provided in the judge's decision, we shall order the Respondent to cease and desist from the additional violations found herein, and to bargain in good faith with the Union without insisting to impasse that it consent to modifications in the terms and conditions of the Master Agreement during its effective term and without locking out employees in support of such proposals. We shall also order the Respondent to offer those employees who were locked out on October 22, 2013, who have not yet been reinstated, immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any replacements hired in their places while they were locked out. The Respondent shall make the locked out employees whole for any loss of earnings or other benefits incurred by them as a result of the unlawful lockout. The amounts owed shall be computed on a quarterly basis, less net interim earnings, in the manner prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). Further, we shall order the Respondent to compensate affected employees for any adverse tax consequences of receiving a lump-sum backpay award and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for each employee. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

ORDER

The National Labor Relations Board orders that the Respondent, Kellogg Company, Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 252-G (the Union) in the unit described below by insisting to impasse that the Union consent to modifications in the terms and conditions of a collective-bargaining agreement during its effective term or by locking out employees in support of such proposals.

> All regular hourly rate employees, including production, maintenance, warehouse, boiler house and all other departments of the plant.

(b) Threatening to lock out employees in order to compel acceptance of its unlawful bargaining demands.

(c) Locking out or otherwise discriminating against employees in order to compel acceptance of its unlawful bargaining demands.

(d) Failing and refusing to provide the Union with information it requests that is necessary and relevant to the performance of its role as the collective-bargaining representative of the unit employees.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union in the unit described above, without insisting to impasse that the Union consent to modifications in the terms and conditions of a collective-bargaining agreement during

its effective term or locking out employees in support of such proposals.

(b) Within 14 days from the date of the Board's Order, offer those employees who were locked out on October 22, 2013, who have not yet been reinstated, immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any replacements hired in their places while they were locked out.

(c) Make whole all employees in the bargaining unit described above, for any loss of earnings and other benefits they suffered because they were unlawfully locked out, in the manner set forth in the amended remedy section of this decision.

(d) Compensate employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Timely furnish the Union with the information about job bidding that it requested on October 10, 2013.

(g) Within 14 days after service by the Region, post at its facility in Memphis, Tennessee, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 10, 2013.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 15 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 7, 2015

_____

Mark Gaston Pearce, Chairman

_____

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER JOHNSON, concurring.

I think this is a very difficult case.

On the one hand, in essential agreement with part of my colleagues' rationale, I could analyze the problem as follows. The Respondent was bound to a master collective-bargaining agreement (the Master Agreement) that did two things salient to the issues at hand: (1) it expressly recognized two different classes of employees, "regular" and "casual" and (2) it utilized the descriptor "casual" to delineate the second class of employee, the common understanding of which is an employee who performs work on an irregular and sporadic basis. The Respondent's bargaining proposal for the local agreement, contrary to these terms, was designed so that it could hire *only* "casual employees" to provide the *full spectrum* of the Respondent's labor needs, not just sporadic labor, and—eventually—to replace the entire work force with a single class of casual employees. Moreover, with the progressive elimination of all regular employees, all the Master Agreement's provisions pertaining to those regular employees, such as the wage progression tables applying to newly hired regular employees and similar provisions, would then become meaningless. This seems an acceptable analysis, because:

> [i]n interpreting a contract, the parties' intent underlying the contract language is paramount and is given controlling weight. To determine the parties' intent, the

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

> Board looks to both the contract language and to the relevant extrinsic evidence, such as the parties' bargaining history and past practice. When there is no extrinsic evidence, the Board looks to the ordinary meaning of relevant contract terms as applied to the facts of the case.

Resco Products, Inc., 331 NLRB 1546, 1548 (2000). The precedent specifically explains that bargaining history means "the bargaining history of the provision itself." E.g., *Mining Specialists*, 314 NLRB 268, 268–269 (1994).

The above precedent clearly applies to interpretation of the terms of the Master Agreement. Although there is no Master Agreement bargaining history in the record that helps us understand what precise distinction the parties intended in their separation of "regular" and "casual" employees in that agreement, the ordinary meaning of the term "casual" has been found by two Federal circuit courts of appeals to be limited to those employees used less frequently than typical "regular" employees:

> The dictionary contains a standard definition of "casual employment":
>
> Employment at uncertain or irregular times. Employment for short time and limited and temporary purpose. Occasional, irregular or incidental employment. Such employee does not normally receive seniority rights nor does he normally receive fringe benefits.

Central States, Southeast & Southwest Areas Pension Fund v. Independent Fruit & Produce Co., 919 F.2d 1343, 1350 (8th Cir. 1990) (citing *Black's Law Dictionary* 198 (5th ed. 1979)). See also *Brown-Graves Co. v. Central States, Southeast & Southwest Areas Pension Fund,* 206 F.3d 680, 684 (6th Cir. 2000) ("As the Eighth Circuit has done, we shall apply the ordinary meaning to the term 'casual employee' where no other definition is contained in the CBAs.").

The Respondent's contract proposal, as conceded by the Respondent, would be to use casual employees identically in manner with regular employees. For newly hired employees, this would immediately collapse the two separate categories set up by the Master Agreement into one category, and thereby utilize casual employees in a manner inconsistent with the ordinary meaning of the word "casual." And, that would result in a prohibited midterm modification that in turn leads to a justified unfair labor practice finding.

Not so fast, one might say. Viewing the matter from an alternate perspective, one could determine that the Respondent and the Union expressly decided to split different categories of terms and conditions of employment between a Master Agreement and Supplemental, local agreements. This was a conscious choice. For example, although the local agreements could not override the Master Agreement, the parties stated, in relation to local agreements, that the Master "Agreement shall cover only those matters specifically included herein. . . ." Master Agreement, section 1.01(c). It was only in the Memphis local agreement, that the parties chose to specify both the purpose of casual employees (to "provide regular employees with relief from extended work schedules") and the detailed rules for utilizing casual employees, such as when and how often a casual employee could be used, and how many casual employees could be used. 2010 Memphis Supplemental Agreement, section 107. Seen in this light, the bargaining history shows that the Master Agreement was *never intended* to cover the roles and conditions pertaining to nonregular employees, and such matters were relegated entirely to the local agreement. Further supporting this interpretation is that the Memphis local agreement created an entire new classification (student employees) that was not in the Master Agreement at all. It also appears that, according to the testimony credited by the judge, the Respondent's and the Union's negotiators both ultimately shared a mutual understanding that the local agreement was the proper place to define the role and duties of casual employees:

> I credit Muth's [i.e. Respondent's negotiator's] uncontroverted testimony that in early to mid-bargaining [for the 2010 Memphis Local Agreement], he and [Union] International Representative Johnson conversed in the hallway. Johnson asked if there was any issue about negotiation of the casual concept at the local level given the existence of the master agreement. Muth replied that he did not believe so because the Battle Creek local agreement 30 [i.e. another local agreement] already contained a casual employee program, and nothing in the master agreement prohibited it. The Local did not raise the issue in subsequent negotiations.

Thus, viewed from this perspective, the Respondent's bargaining proposal to change these contractual terms for casual employees in local negotiations did not contravene the intent of the parties to the Master Agreement. For example, the proposal did not eliminate the job classification of regular employees, and it did not change the duties and rights of regular employees in any respect. Instead, bargaining about the details of the casual employee classification within the local agreement was consistent with the parties' practice both in Memphis and at the Respondent's other three plants. The Union opposed the proposal, not because it contravened the Master

Agreement, but because it represented a massive change to the local agreement's status quo, eliminating all caps and many other restrictions on casual employees, and, theoretically, it would enable the Respondent to hire only casual employees, with the same duties and expectations as regular employees, differing only in the lesser employee casual wage rate and more limited benefits.

Therefore, one could easily prefer the judge's analysis, which is in accordance with the above, to my colleagues' analysis. The Respondent proposed a radical change in the way it utilized casual employees in Memphis. But parties are entitled to take extreme positions in bargaining; "it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the [Board] would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement." *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 103–104 (1970). In other words, the Board's role is not to judge the value or efficacy of contract proposals, but rather to supervise "the procedure alone, without any official compulsion over the actual terms of the contract." Id. at 108.

My colleagues find that the Respondent's proposals here concerned casual employees "in name only," while they were in reality an attempt to modify the economic terms for regular employees covered by the Master Agreement. In so finding, my colleagues go beyond the actual language of both the Respondent's proposals and the parties' contract to at least imply that the violation found here is based partly on their disagreement with the Respondent's intent. In this regard, I respectfully but emphatically disagree with my colleagues' reliance on analyzing, e.g., the "impact of the [Respondent's] proposals," the fact that the proposal's casual employees "would be very different" from those in the prior agreement, what the Respondent's "core workforce" was entitled to, or that the Respondent's proposal effectively represented an overall wage cut that the Respondent had been historically unable to achieve with proposed wage cuts targeted to the regular employees. Those factors reflect a subjective analysis of the Respondent's proposal prohibited by *H. K. Porter,* supra, rather than an objective analysis of whether actual contract terms were modified. Where parties have successfully engaged in the process of collective bargaining and reached an agreement, we protect the process by respecting the terms of the agreement, not by imposing *our* understanding of its spirit. Moreover, where a party seeks an advantage not precluded by the terms of an agreement then in effect, "[i]t cannot be said that the Act forbids an employer or a union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining." Id. at 109. That would also mean that the consequent lockout was lawful. Because these proposals concerned mandatory subjects of bargaining, the Respondent was entitled to insist upon them to impasse, and after impasse, to lock out its employees in order to exert economic pressure in support of its legitimate, if extreme, bargaining position. *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965); *National Extrusion & Mfg. Co.*, 357 NLRB No. 8, slip op. at 4 (2011), enfd. sub nom. *KLB Industries, Inc. v. NLRB*, 700 F.3d 551 (D.C. Cir. 2012).

Finally, in this regard, the "federalist" bargaining structure set up by the master/local agreement model used by the Respondent and the Union, in which one broad, general master agreement governs multiple subordinate, detailed local agreements, is a common and useful model for collective-bargaining relationships. By imposing the Board's interpretation of the parties' intentions in the place of both the specific structure and language of their contracts and proposals, and their expressed intent to relegate specific casual employee restrictions to local bargaining only, my colleagues undermine this model. By doing so they erode parties' ability to rely upon the bargained-for terms of—or *lacunae* within—their master agreements and deny them the benefits of their bargains, to the ultimate detriment of the stability of labor relations that is the fundamental motivating purpose of our Act.

I think either analytical approach seems reasonable on the particular facts of this case, albeit I would disagree with my colleagues' approach were it expanded beyond the fairly unusual facts here, in which an employer's casual employee proposal would concededly eradicate the regular employee classification and its attendant pay schedule for all future hires at Memphis, i.e., casuals would be the "employee of the future." Nevertheless, the Respondent here should have great latitude to propose and insist to impasse revisions of the local agreement's provisions pertaining to the subject of casual employment, including revisions that encompass a meaning of such employment that is intended to be different from the common meaning of that term. Given that the master/local structure of the contracts and the bargaining history both show that the matters at hand were supposed to be worked out on the local level, the Board has no business finding midterm modifications arising from the generalized language of a master contract in the ordinary circumstance.

But I join in finding an unfair labor practice here. The Eighth Circuit's analysis in *Independent Fruit*—under highly analogous circumstances—is persuasive. There, a 1979 collective-bargaining agreement covering "casual employees" that contained a number of restrictions on

casual employee complement and workload was replaced by a 1982 agreement that deleted all such restrictions. 919 F.2d at 1349. The Eighth Circuit held that this deletion did not change the nature of the general term "casual employee" to give it a meaning "contrary to its dictionary definition":

> Given the dictionary definition of "casual employment," we disagree that the 1982 collective bargaining agreement was ambiguous. Even though several of the restrictions found in the 1979 agreement were deleted from the 1982 agreement, the parties retained the term "casual employee." In effect, they argue that by removing these restrictions from the 1982 agreement they gave a term a meaning contrary to its dictionary definition, and that they were not obligated to say so. Agreements are written purposely to avoid such a situation.

Id. at 1351. Following this analysis, in my view, with the expiration of the 2010 Memphis Local Agreement, the Respondent mostly had a clean slate to work on in bargaining new duties, obligations, and restrictions for casual employees. But not an entirely clean slate. The Respondent could not collapse two job positions into one, and the casual employees still had to be "more casual," in some fairly arguable sense, than regular employees. As my colleagues correctly note, the only difference remaining between the two types of employees under the proposal was the lower casual employee wage rate. The Master Agreement's contractual reference to the existence of a second, separate category of "casual employees" would then effectively be modified. For that reason only, I agree with my colleagues in finding a violation here.[1]

Dated, Washington, D.C. May 7, 2015

Harry I. Johnson, III, Member

NATIONAL LABOR RELATIONS BOARD

[1] I concur in finding that the Respondent's bargaining proposal for alternative crewing was also unlawful, but only because I would find that it was an integral part of the casual employee proposal and would thereby modify the Master Agreement's overtime provisions for newly hired regular employees. Standing alone, the crewing proposal would be lawful. As the judge stated, it concerned topics that came under the local agreement and would not constitute a proposal for midterm modifications of the Master Agreement. Crewing appears nowhere in the Master Agreement.

I join my colleagues in adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to provide presumptively relevant information requested by the Union.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 252-G (the Union) in the unit described below by insisting to impasse that the Union consent to modifications in the terms and conditions of a collective-bargaining agreement during its effective term or by locking out employees in support of such proposals.

> All regular hourly rate employees, including production, maintenance, warehouse, boiler house and all other departments of the plant.

WE WILL NOT threaten to lock out our employees in order to compel acceptance of our unlawful bargaining demands.

WE WILL NOT lock out or otherwise discriminate against our employees in order to compel acceptance of our unlawful bargaining demands.

WE WILL NOT fail and refuse to provide the Union with information it requests that is necessary and relevant to the performance of its role as the collective-bargaining representative of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights listed above.

WE WILL, on request, bargain in good faith with the Union in the unit described above, without insisting to impasse that the Union consent to modifications in the terms and conditions of a collective-bargaining agreement during its effective term and without locking out employees in support of such proposals.

WE WILL, within 14 days from the date of the Board's Order, offer those employees who were locked out on October 22, 2013, who have not yet been reinstated, full reinstatement to their former jobs, or if those jobs no

longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging, if necessary, employees hired from other sources to make room for them.

WE WILL make all locked out employees whole for any loss of earnings and other benefits suffered as a result of our unlawful conduct, with interest, in the manner set forth in the Board's decision.

WE WILL compensate affected employees for any adverse tax consequences of receiving a lump-sum backpay award and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for each employee.

WE WILL provide to the Union the relevant information regarding job bidding that it requested on October 10, 2013.

KELLOGG COMPANY

The Board's decision can be found at www.nlrb.gov/case/15-CA-115259 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Steven E. Carlson, Esq., for the General Counsel.
David M. Buday and *Keith E. Eastland, Esqs. (Miller Johnson),* for the Respondent.
Jeffrey R. Freund (Bredhoff & Kaiser, P.L.L.C.) and *Samuel Morris, Esqs. (Godwin Morris Laurenzi Bloomfield, P.C.),* for the Charging Party.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This case is before me on a March 27, 2014 complaint and notice of hearing; April 8, 2014 amendment to complaint; and counsel for the General Counsel's clarification of the complaint at trial[1] (the complaint). The complaint stems from unfair labor practice charges that Bakery, Confectionary, Tobacco Workers and Grain Millers International Union and its Local Union 253-G[2] filed against Kellogg Company (the Respondent or the Company). The allegations arise from the Company's stance at 2013 negotiations over a successor local agreement for its Memphis, Tennessee facility (Memphis or the plant), and its subsequent lockout of more than 200 bargaining unit employees there.[3]

I conducted a trial in Memphis, Tennessee, from May 5–9, 2014, at which I afforded the parties full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.[4]

On July 14, 2014, the General Counsel filed a motion to file a reply brief and in fact filed one. On July 24, 2014, the Respondent filed an opposition to that motion. Section 102.42 of the Board's Rules and Regulations, Series 8, as amended, makes no provision for the filing of reply briefs, and allowing such is a matter addressed to the administrative law judge's discretion. *Coca-Cola Bottling Works,* 186 NLRB 1050, 1050 fn. 2 (1970). In other cases cited by the General Counsel or by the Respondent in support of their respective positions, the Board's decisions do not reflect that the granting or denial of a motion for leave to file a reply brief was the subject of exceptions that the Board addressed. Accordingly, those decisions are not precedent. See *California Gas Transportation, Inc.,* 352 NLRB 246, 246 fn. 3 (2008). Nonetheless, they can provide useful guidance and, collectively, they indicate that consideration should be given to such factors as opposition or nonopposition by opposing counsel, length of the reply brief, any prejudice resulting from nonacceptance, and delay in the decisionmaking process.

Clearly, the party seeking to file a reply brief normally has the burden to show, in essence, some reason warranting acceptance of such. This comports with the judicial principle that the parties' right to file posthearing briefs on behalf of their clients is not unlimited, either as to time or otherwise. Without such limits, the parties could theoretically file reply briefs to reply briefs ad infinitum. As the Board aptly stated in *Franks Flower Express,* 219 NLRB 149, 150 (1975), enfd. mem. 529 F.2d 520 (5th Cir. 1976), "The administration of justice requires an end to litigation at some point." I note here that the original date for the filing of briefs was June 13, 2014, but Associate Chief Judge William Cates granted in part the Respondent's unopposed motion for an extension of time, to June 27, 2014. The General Counsel has not demonstrated why he could not have fully argued the facts and applicable law in his brief, or any prejudice to the General Counsel in not allowing him to file a reply brief. Accordingly, his motion is denied.

Issues

(1) In 2013 negotiations for a successor local agreement at the plant, did the Respondent's insistence to impasse on its proposals for the expanded use of

[1] GC Exh. 1(w).

[2] Hereinafter separately referred to as the International and the Local, and collectively as the Union.

[3] All dates hereinafter occurred in 2013, unless otherwise indicated.

[4] The General Counsel's unopposed motion to correct transcript is granted.

casual employees and alternative crewing scheduling violate Section 8(a)(5) and (1) of the Act because those proposals constituted midterm modifications to the wage and benefit provisions of the parties' master collective-bargaining agreement that covered Memphis and three other Ready to Eat Cereal (RTEC) facilities, and were therefore nonmandatory subjects of bargaining?

Or, as the Respondent contends, were those proposals properly the subject of local contract bargaining, based on language in the master agreement and the most recent local Memphis agreement, as well as what has been negotiated locally at the three other RTECs?[5]

(2) On October 16, did the Respondent unlawfully threaten to lock out bargaining unit employees at Memphis if the Local did not ratify the Respondent's last contract offer before October 22?

(3) On October 22, did the Respondent unlawfully lock out those employees? Counsel for the General Counsel clarified at trial that the complaint's 8(a)(3) allegation is based solely on the Respondent's alleged unlawful insistence to impasse.

(4) Since October 10, has the Respondent unlawfully failed and refused to provide the Local with information that it requested concerning job bidding at the plant?

Witnesses and Credibility

Most of the salient facts are undisputed, and differences in accounts between the General Counsel's and the Respondent's witnesses were in the nature of nuance and emphasis, not substance. Accordingly, credibility resolution is not a significant factor in deciding the merits of the allegations.

The General Counsel called Memphis employee and Local Vice President Earl Earley, former International Representative Anthony Johnson, and International Vice President Robert Oakley. The General Counsel called Kristie Chorny, Kellogg's senior director of labor relations (LR), as an adverse witness under Section 611(c). The Union called Trevor Bidelman, an employee at Battle Creek and business agent of Local 3-G, which represents bargaining unit employees at that facility.

The Respondents' witnesses were:

(1) Kristie Chorny.
(2) Darin Aldrich—human resources (HR) manager, Memphis.
(3) Inran Husainali—HR manager, Battle Creek; former employee relations (ER) manager, Omaha.
(4) Lacey Ivy—ER manager, Memphis.
(5) Rachel McConnell—senior operations manager and former bargaining-unit employee, Memphis.
(6) Jon McPherson—former HR manager, Battle Creek; former vice president of LR.
(7) William Muth Jr.—former LR manager, Omaha; former HR manager, Battle Creek; and former LR director for the Morning Foods Division.
(8) Patricia Smith—ER manager, Lancaster.
(9) Kenneth Stiltner—HR manager, Omaha.

Facts

Based on the entire record, including testimony and my observations of witness demeanor, documents, and stipulations, and the thoughtful posttrial briefs that the General Counsel, the Union, and the Respondent filed, I find the following.

The Bargaining Framework

The Respondent, a corporation headquartered in Battle Creek, Michigan, operates the plant, where it has been engaged in the processing, packing, and nonretail sale of ready-to-eat cereal products. The Respondent has admitted Board jurisdiction as the complaint alleges, and I so find.

Since about 1958, the Respondent has recognized the Union as the exclusive collective-bargaining representative of a unit composed of all regular hourly rate employees, including production, maintenance, warehouse, boilerhouse, and all other departments at the plant, excluding salaried employees.

Such recognition has been embodied in a series of master and local supplemental collective-bargaining agreements, with the most recent master agreement effective from September 30, 2012, to October 3, 2015;[6] and the most recent local supplemental agreement for Memphis effective from October 22, 2010, to October 20, 2013.[7] The master agreement covers the Respondent's four RTEC plants, in Memphis and the locations described in footnote 5. Each plant has its own separate agreement negotiated at the local level. All of these supplemental agreements have provisions for a casual work force, although the terminology varies.

The crux of the dispute in this case hinges on a determination of whether the Respondent's proposals for changes in local contract language concerning casual employees and alternative crew scheduling were governed by the master agreement.

At the time of the lockout, the plant employed over 200 bargaining unit employees, none of whom were casuals. At all four RTEC's, casuals have been recognized to be part of the local bargaining unit.

Relevant Provisions of the Master Agreement

Oakley was one of the signers for the Union; Chorny, Husainali, and Stiltner were among the signers for the Company.

The scope of the master agreement vis-à-vis the local supplemental agreement is set out in detail in sections 1.01 and 1.02 (Jt. Exh. 2).

Section 1.01 provides as follows:

(a) The Company has previously entered into separate agreements for each of its four plants with the re-

[5] At Battle Creek, Michigan (Battle Creek); Lancaster, Pennsylvania (Lancaster); and Omaha, Nebraska (Omaha).

[6] Jt. Exh. 2.

[7] Jt. Exh. 1.

spective Local Unions . . . [which] "Supplemental Agreements" shall continue in effect as provided in such agreements except as they may be specifically amended or modified by this Agreement.

(b) The collective bargaining agreement for each of the bargaining units at the Company's plant shall be this Agreement and the Supplemental Agreements . . . at each respective plant. The terms and conditions of the Supplemental Agreements shall be binding on the parties thereto regardless of the continuation or termination of this Agreement, and the terms and conditions of this Agreement shall be binding on the parties to this Agreement regardless of the continuation or termination of any Supplemental Agreement.

(c) This Agreement shall cover only those matters specifically included herein; and in the event that any provision of any of the Supplemental agreements is in conflict with any provision of this Agreement, the provision of this Agreement shall prevail.

(d) The term "employees" whenever used in this Agreement and for purposes hereof shall include all those employees included in each bargaining unit as defined in each Supplemental Agreement.

. . . .

(f) Those matters which have been covered by provisions in this Agreement shall not, unless the parties thereto agree, be subject to negotiation between the Company and any of the respective Local Unions in an effort to secure changes in or to secure a new Supplemental Agreement. Those matters covered by provisions in a Supplemental Agreement shall not, unless the parties thereto agree, be subject to negotiation between the Company and the International Union in an effort to secure changes in or a new version of this Agreement.

Section 1.02 provides:

> The Company will continue to negotiate and enter into Supplemental Agreements [with the four local unions]. Such Supplemental Agreements shall continue those matters which the parties have agreed are to be negotiated separately by the Company and each Local Union.

Section 1.03(d)(3) provides that a regular employee who is displaced as a result of the elimination of his or her permanent job shall have the option of terminating employment and receiving severance pay or continuing employment and being placed in accordance with the applicable supplemental agreement.

Section 1.05 provides for deduction of initiation fees and dues for "regular employees and employees designated as seasonal employees who have completed the defined trial period at each plant."

Section 5.01 states that all matters pertaining to hourly wages are contained in the Wage Appendix. The Wage Appendix has provisions for a folded-in floating cost of living allowance (COLA). It contains a new hire progression schedule for regular employees (with the exception of skilled mechanics): 70 percent of job rate and 70 percent of COLA for the first year of service; 80 percent and 80 percent for the second year; 90 percent and 90 percent for the third and fourth years; and full job rate and COLA after completion of the fourth year.

The Wage Appendix[8] also sets out rates for "seasonal employees" (a classification in the Omaha supplemental agreement), based on when they started service. Those who began seasonal eligibility prior to October 2, 2005, receive 70 percent of job rate and 100 percent of COLA; those who became eligible after that date receive 70 percent of job rate and 70 percent of COLA. The appendix has a detail table of COLAs, based on the consumer price index.

The Wage Appendix further provides that a rate of $6 less than (regular) job rate is established for all work performed by nonregular employees, such as temporary and casual employees. Exceptions are set out for Lancaster casual employees as of September 29, 1996, who retain their wage rate and progression scheduled as previously established in the Lancaster supplemental agreement; and for Battle Creek casual employees as established on September 25, 1999.

However, the appendix does not contain any classifications or set out any hourly pay rates for them. Rather, the classifications and their wage rates are negotiated exclusively at the local level. Similarly, the wage rate for any new classification added in the master agreement is negotiated locally.

Pertinent to the Respondent's alternative crew scheduling proposals, section 5.04 addresses overtime. Subparagraph (a) provides for time-and-a-half pay for all hours worked in excess of the normal workday and for all hours worked on Saturday, except that an employee in a department which normally operates 7 days per week will be paid such rate for hours worked on a regular shift on what would otherwise be their first scheduled day of rest in that workweek. Subparagraph (b) provides for double time for all hours worked on Sunday. Subparagraph (d) provides that all other matters pertaining to overtime pay not specifically included in the agreement are excluded from the agreement and specifically reserved to negotiation for and inclusion in the respective Supplement Agreements.

Various memoranda of agreement (MOAs) are incorporated into in the master agreement. One (Jt. Exh. 2 at 81) provides for monthly meetings of local plant management and local representatives to discuss outside contracting, outsourcing, effectively utilizing the work force, and ways to cost effectively perform work with bargaining unit employees (UAC meetings).

An MOA of September 29, 2002 (id. at 96), provides an explanation of supplemental work injury benefits for seasonal and temporary employees as negotiated in September 1975, with the term "seasonal and temporary employees" referring to "those employees who are so designated in any of the supplemental agreements."

An MOA of October 2, 2005 (id. at 100), addresses outside contracting and provides, in part, that management decisions thereon be discussed with the Local Union.

The Master Agreement does not guarantee regulars any minimum hours of work, overtime, or particular schedules; or limit

[8] Jt. Exh. 2 at 66, et. seq.

the number of hours casuals can be used or the scope of their duties.

Negotiations for the 2005, 2009, and 2012 Master Agreements

In all of these negotiations, representatives of both the International and the four local unions participated on behalf of the Union; headquarters and local management on behalf of the Company. The versions of company and union representatives regarding what was said therein were very similar and any consistencies immaterial. The parties never had an agreement, oral or in writing, that use of casual employees or alternative crew scheduling were or were not topics exclusively for master negotiations, as opposed to local contract bargaining. Oakley was the chief spokesperson for the Union in all of these negotiations; the Company's chief spokesperson was Joe Misner in 2005, Muth in 2009, and McPherson (who attended all three) in 2012.

2005 Master Agreement

Misner stated that the Company wanted to make changes to reduce its costs and become more competitive. The Company's proposal 7 was to add new language that regular employees hired after October 2, 2005, would receive a compensation package with reduced progression and COLA and other benefits.[9] The Union responded that in order to justify its agreement to such a change, the Company would have to give something back in relation to job security for the bargaining unit. The parties had further discussions on the subject, but the Company later withdrew the proposal. Proposal 11, establishment of a qualified casual work force MOA, was tied in with proposal 7 and dealt with in the same fashion.

2009 Master Agreement

At a prenegotiations meeting that the Company had requested, Muth said that the Company had talked earlier about casuals and alternative crew schedule and wanted to explore that again in the upcoming negotiations. He reiterated orally what the Company had proposed in writing in 2005 negotiations. McPherson stated that the 2005 agreement was not going to be a sustainable model and hoped that the Union's expectations would be more realistic. He floated ideas about health care, retiree health care, and COLA concessions. Oakley again responded that the Union might be willing to make concessions in some areas but had to have certain things in return in the area of job security.

The Company's initial proposals contained an alternative crewing proposal (proposal 5): double time would be paid on Sunday only if it was the scheduled day of rest (if it was an employee's schedule day of work, pay would be at time-and-a-half).[10] The Union's initial proposals included a proposal (proposal 1) that the term "employees" whenever used in the Master Agreement would include all employees (permanent, casual, temporary) included in each bargaining unit as defined in each Supplemental Agreement.[11] Muth responded that the supplemental contracts already recognized that those classifications were covered. At the next session, Muth stated that the Company was not interested in proposal 1, and in the third or fourth session, the Union withdrew it.

2012 Master Agreement

At a prenegotiations meeting, McPherson raised the subjects of casual employees and alternative crew schedules, asking if there was any possibility that the parties could discuss and make changes in those areas. Oakley replied that they were going in circles but that if the Company was willing to address the Union's issues, the Union was willing to look at theirs. McPherson responded that the Company was not going to pursue those subjects.

The Company's initial proposals, presented August 8, 2012, included a new provision that an employee in a department which normally operates 7 days a week (continuous crewing) would not automatically receive Sunday premium pay.[12] McPherson stated that the Company had the right to implement alternative crewing but that it did not make economic sense in view of language in the master requiring Kellogg to pay double time on Sunday. The parties discussed the proposal but could not reach agreement, and the Company withdrew it. McPherson asked if the Union would be willing to discuss it at a UAC meeting, and Oakley agreed. However, neither party raised the matter at the subsequent UAC meeting held in the spring of 2013.

Neither party proposed any changes in the wage provisions (art. 5) from the preceding master agreement.

Relevant provisions of the 2010 Memphis Supplemental Agreement

Section 104 expands on the language of section 103(d) of the Master Agreement in addressing offers of severance pay and bid rights to employees in the event of job discontinuance.

Section 106 deals with student employees, a classification not mentioned in the Master Agreement. It describes the criteria they must meet for employment and specifically states that they are not regular hourly employee and receive limited benefits contained in the master or Supplement Agreement. They may work extra relief and vacation replacement only during May 1 through the Saturday on or following September 15, and the second Monday of December through the Saturday on or following January 15. They may not be utilized when regular employees are on layoff unless the work is refused by the latter. In addition, regular employees are offered overtime opportunities before students outside the vacation replacement periods. They are eligible to voluntarily join the Union at the beginning of employment and pay union dues if they work 1 day on the month.

Section 107 is the casual program, modified from the previous supplemental contract. It states:

> The purpose of this program is to provide regular employees with relief from extended work schedules through the use of Casual employees. Casual employees will not be utilized when regular employees are on [involuntary] layoff . . . Casu-

[9] GC Exh. 3 at 2.
[10] R. Exh. 47 at 1.
[11] R. Exh. 48 at 1.
[12] R. Exh. 34 at 2–3 (proposal 3).

al employees will be limited to 30% of the total number of regular employees . . . .

On any given day, the total number of scheduled regular production employees and Casual employees cannot exceed the total number of regular employees on the Master Seniority List except when mutually agreed upon by the parties.

A. The terms and conditions of the Supplemental and Master Agreements will not apply to Casual employees. Only the following fringe benefits will be granted to Casual employees, and they will not accumulate seniority:

- Uniforms; shoe subsidy MOA applies
- Lunch and breaks
- Shift differential
- Wage Appendix of the Master Agreement-COLA

B. The wage rate is 70% of the qualified rate for the first year and 80% of the qualified rate starting the second year. 80% of a given qualification rate is the maximum wage rate for his program. Casuals are eligible for overtime after forty (40) hours worked in a workweek. Shift premium rates will apply. No call-in pay will be authorized and individuals will be paid only for hours worked at straight time.

This wage rate in this provision, on its face, conflicted with the $6 less an hour provision in the Master Agreement, and Chorny testified that it indeed did so.[13]

C. Former regular employees will be considered for selection into the Casual Employment Program based on satisfactory attendance, work record, job performance assessment, and interview.

D. The casual employee can be used only after overtime has been offered to regular employees as defined by Extra Work Rules, including any employees on layoff [with five exceptions].

E. There will be no maintenance or equalization of hours worked. Individuals failing to accept three consecutive assignments may be terminated from the program . . . .

. . . .

G. The Company may discontinue employment without such action being subject to the grievance procedure.

H. Casual employees will be considered for regular employment along with all other applicants.

Section 401, layoff, provides that no new employees will be hired until all regular employees temporarily laid off have been offered an opportunity to return to work if they have the skill and ability for the opportunity that is available.

Section 404, job bidding, provides, inter alia, that only regular hourly employees who have completed their probationary period may bid for a job.

Section 501, workweek, provides that the workweek will begin with the first shift on Monday and that the normal shift schedules will be 7 a.m. to 3 p.m., 3 to 11 p.m., and 11 p.m. to 7 a.m., with the recognition that the Company needs some leeway in the application of these provisions.

Section 502 provides for double time pay for all hours worked on Sunday; section 503 for, inter alia, equalization of extra work opportunities to all employees within a qualified group based on hours; and section 701, for 4 hours pay for reporting and being sent home without working.

Section 801, et seq., addresses wages. The new-hire progression schedule is that set out in the 2005 Master Agreement that was in effect at the time the Supplemental Agreement was negotiated. A night premium application is described, followed by hourly rates per job effective October 1, 2009, including a $1.89 COLA fold-in as of that date as per the terms of the Master Agreement.

As with the Master Agreement, the Supplemental Agreement incorporates a number of MOAs. One (Jt. Exh. 1 at 59) from December 19, 2007, the date the predecessor local contract[14] went into effect, provides that the labor relations committee will meet at least once quarterly to discuss the employment and staffing status of the plant for the purpose of discussing the root cause of staffing and forcing issues.

An MOA (id. at 73) from the same date provides that the Company can use contracted labor for "downtime cleanup"[15] in order to provide regular hourly employees with relief and time off from downtime cleanup assignments. However, contracted labor will not be used when regular hourly rate employees are on layoff, unless they refuse the work.

2010 Supplemental Agreement Negotiations

Business Agent William Magee was the chief spokesperson for the Union; LR Manager Eric Weber for the Company.

The Company repeatedly stated that the casual employee concept created a labor cost advantage for the Company by having work done by employees who were paid less and received few or no benefits, thereby making a plant more competitive. It therefore proposed a new provision establishing a casual employees program, pointing to the temporary casuals language in the Master Agreement as enabling language. The parties negotiated such, including the 30-percent cap, melding casual employee program language already contained in two other Supplemental Agreements. They had no discussion concerning how wage and benefits provisions in the Supplemental Agree-ment would bear on the existing Master Agreement.

I credit Muth's uncontroverted testimony that in early to midbargaining, he and International Representative Johnson conversed in the hallway. Johnson asked if there was any issue about negotiation of the casual concept at the local level given the existence of the Master Agreement. Muth replied that he

[13] Tr. 298; see also Tr. 420. At the time that the 2010 local agreement went into effect, the Master Agreement, effective from September 27, 2009, to September 30, 2012 (R. Exh. 18), provided for the $6 an hour less, as did the 2012 Master Agreement.

[14] R. Exh. 51.

[15] A 48-hour period approximately every 28 days when the plant shuts down production for thorough cleaning.

did not believe so because the Battle Creek local agreement already contained a casual employee program, and nothing in the Master Agreement prohibited it. The Local did not raise the issue in subsequent negotiations.

2013 Supplemental Agreement Negotiations

At the outset, I note that the General Counsel has not alleged that the Respondent engaged in surface or otherwise illegal bargaining and that the Respondent never filed unfair labor practice charges alleging that the Union did so. Indeed, the Respondent withdrew or modified some of its initial proposals, the Union made certain concessions, and the parties on October 1 reached tentative agreement on several items.[16] Accordingly, I need not go into great individual detail about each of the 12 bargaining sessions, held from September 17 to October 15. Joint Exhibit 3 is comprised of the bargaining notes that Shannan Zenters typed contemporaneously for the Company during negotiations (except for her notes of the September 18 session, which were inadvertently erased). The parties stipulated that the notes are a generally true and an accurate record of who said what during bargaining, although not to be considered necessarily verbatim.[17] As contemporaneous recordings, they are presumed to be generally more reliable than witness testimony given months after the meetings occurred. In any event, the testimony of those who attended differed little or not all from the contents of the notes.

Shelton was the chief spokesperson for the Union; Chorny for the Company. From a reading of the notes of negotiations, as well as testimony, it is evident that the first bargaining session, on September 17 (see Jt. Exh. 3, tab A), set the tone for what became the parties' irresolvable disagreement over the Company's proposals on expanded use of casual employees and alternative crewing. The Company's key objective from the outset was modifications to these provisions in the 2010 agreement.[18]

At that first session, the company representatives, Chorny and Bob Solt, in particular, expressly said that the thrust of Kellogg's proposals was to reduce labor costs and increase the plant's profitability. Solt gave a slide presentation[19] and discussed the decline in RTEC business in general, saying that "Memphis is at risk. It is not a sustainable model . . . . We must significantly improve our cost structure . . . . We must be competitive and take back pounds [and increase productivity]."[20] And, near the end of the meeting, Chorny stated that the parties had an opportunity to "fix the labor costs and how we can function in Memphis to build a sustainable cost model."[21] The Company was proposing a new kind of casual employee, not in existence in the other RTECs, and told this to the Union.[22] The Company also told the Union that it considered its current bargaining unit employees to be "legacy employees" and wanted to make casual employees "the employee of the future."[23]

The Company presented the Union with 24 proposals to change provisions in the existing supplemental agreement (Jt. Exh. 4A). As the summary page reflects, most of the substantive proposals related to casual employees, whereas others reduced employee remuneration by cutting work guarantee pay from 4 hours to 1 hour, and by eliminating emergency guarantee pay, call backpay, delayed notice to report pay, early call in pay, paid lunch period, and the Company's provision of uniforms.

With respect to student employees (sec. 106), company proposal 2 eliminated that classification, replacing it with the term "temporary employees," whom the Company would have the right to hire to cover casual absenteeism, vacations, spikes in business, or emergencies. Student employees could be hired as temporary employees.

As to casual employees, the Respondent proposed very significant changes both in the Company's right to hire and utilize them and in the benefits that they would receive. Thus, company proposal 3 greatly expanded Kellogg's right to hire casual employees, eliminated the 30-percent cap, and expanded casual employees' benefits:

> Casual employees include any employee hired by Kellogg to perform production or any other bargaining unit work covered by this Supplemental Agreement and under this provision. Casual employee shall not be limited in the scope of their work, duties, tasks, hours, or in any other terms or conditions of employment except as expressly agreed to by the parties in this Supplemental Agreement or an applicable Master Agreement. Casuals may be employed on an indefinite basis, and there shall be no restrictions on Kellogg's rights to hire, use manger, or direct casual employees except as specifically set forth in this Agreement or in any specific provisions of an applicable Master Agreement.
>
> Casual employees are part of the bargaining unit and will have rights and benefits as set forth below in this Agreement and in any specific provisions of the Master Agreement governing casual employees.[24]

Additionally, the proposal provided for a flat wage rate of $6 an hour less than the job rate for regular employees (to conform to the Master Agreement), provided that casual employees would accumulate seniority, and eliminated language that causal employees would only be used after overtime has been offered to regular employees.

Other proposals reflected the Company's proposed new section on casual employees:

> Proposal 1 added casual employees to the probationary period provision in Section 102.

[16] See Jt. Exh. 7; see also Jt. Exh. 4, which represents the Company's initial proposals and their modifications during the course of negotiations.

[17] Jt. Exh. 3 at 156.

[18] Tr. 154–155 (Chorny).

[19] See R. Exh. 31, a summary slide that Solt prepared and presented at the Union's request.

[20] Jt. Exh. 3, tab A at 4.

[21] Id. at 27.

[22] Tr. 172 (Chorny).

[23] Tr. 177 (Chorny). See also Tr. 218.

[24] Casuals would continue to be excluded from health and other insurance under Master Agreement sec. 6.01.

Proposal 5 gave them the same grievance rights as regular employees in Section 201.

Proposal 7 changed the language in section 401 that no new employee be hired until all regular employees laid off have been offered an opportunity, by adding "This provision does not restrict Kellogg's right to hire new casual, temporary or student employees consistent with the terms of this Agreement."

Proposal 7 also changed section 404 (job bidding) to give casual employees full job bidding rights. It replaced the language that at the time of signing a job bid, an employee must be eligible to bid, with language that eligibility would be based on a number of guidelines, including that there had been no formal discipline issued to the employee unless management, in writing, indicated otherwise. Additionally, the language that employees may be awarded up to three jobs in a calendar year was changed to one job in a 24-month period. In terms of the job bidding process, the proposal added (to skill and ability), satisfactory attendance, work record, job performance assessment, and unless waived by management, an interview.

Proposal 10 extended the application of equalization of work in section 503 to casual employees.

Proposal 17 extended job assignment provisions in section 708 to casual employees. The proposal further added a provision entitled "flexibility," providing that there would be no jurisdictional restrictions between any jobs and that any regular or casual employee could be assigned to perform any work for which qualified.

Proposals 19 (physical disability transfers) and 21 (night premium application) changed "employees" to "regular or casual" employees.

In sum, adoption of the Company's proposals would have removed any distinctions between regular and casual employees except as to pay and benefits.[25]

Chorny explained that, going forward, any employee hired to do bargaining unit work would be hired as a casual employee but that the Company was not precluding the later hiring of regular employees if needed because of their skills. However, under the proposal, it would not be under any obligation to do so. The Company would be able to hire new casual employees while regular employees were on temporary layoff, but employees on permanent layoff or job discontinuance would first be offered positions that came up—as casual employees—before such positions would be offered to new applicants.

The expiring agreement had no alternative crewing provision, and no such scheduling was in effect at Memphis during these negotiations. With regard to workweek hours (sec. 501), proposal 8 provided that the Company would have the right to establish an alternative crewing schedule and to determine as necessary the definition of a normal workday and normal workweek. The proposal stated that no premium pay would be applicable to the alternative crewing schedule except that regular employees would receive such as per the Master Agreement. Preference would be given to casual employees to crew lines for alternative crewing.

[25] See testimony of Chorny at Tr. 388–389.

Chorny told the Union that its proposals would not impact the pay or benefits of existing regular employees, but she did concede that alternative crewing would reduce the amount of their overtime pay.

The Union's reaction to these proposals was negative, to say the least. Shelton questioned whether the master agreement addressed the alternative crew proposal, to which Chorny responded that scheduling was always bargained at the local level.

The issues of expanded use of casual employees and of having alternative crewing schedules remained unresolved throughout subsequent negotiations. At various times, each side accused the other of failing to bargain in good faith on those subjects. The Union raised objections to various aspects of these proposals, including removal of the 30-percent cap, but never provided any formal counterproposals.

At the last meeting, on October 15 (Jt. Exh. 3, tab L), Shelton started by stating his view that the two issues left were casual employees and alternative crewing schedule. After Chorny agreed, the following conversation took place (id. at 1):

> SHELTON: "[O]ur position is since that is [sic] the only 2 issues we have left to discuss and you tried to get those in the Master and you did not get them, I have filed a board charge against you this morning for you trying to get them in the Supplemental since you did not get them in the Master . . . . We are done negotiating, we are done."
>
> CHORNY: Just to be clear, we did not go after that in the Master. You are seriously walking out on us?
>
> SHELTON: We are through we are done, done forever.
>
> CHORNY: We plan on being here are we are not done bargaining . . . . Just to be clear, none of those are master issues, so if you are walking out on us, that is not bargaining in good faith.

The meeting ended almost immediately thereafter. Later that day, Chorny sent Shelton an email, with attachments.[26] Therein, she responded to his oral information requests of October 10 (to be discussed subsequently), and, as Shelton had also requested, provided a "comprehensive document" showing outstanding proposals, proposals that the Company had withdrawn, proposals to which the parties had tentatively agreed, and their discussions on the length of the agreement. She stated that the Company's casual employee concept and alternative crewing schedule proposals in no way contravened the Master Agreement and that the fact that the parties might have discussed any issue during master negotiations did not preclude bargaining over such topic at the local level. Within a couple of hours, Shelton sent Chorny an email in which he emphasized that the casual employee concept and alternative crewing were master contract matters on which the Union would not negotiate but that the Union remained available for further bargaining on proper supplemental issues.[27] The next morning, October 16, Chorny responded by email, in which she reiterated her posi-

[26] Jt. Exh. 8.

[27] Jt. Exh. 9.

tion that the proposals in question were not meant to modify or alter the master agreement.[28]

On October 16, Chorny emailed Shelton Kellogg's last best offer.[29] That same day, Plant Director Chris Rook sent a letter to bargaining unit employees, advising them that the Company had communicated to the Union that day that if Kellogg's last offer was not ratified by October 22 at 7 a.m., the Company would lock them out.[30]

On October 22, the Respondent locked out bargaining unit employees, and they have remained locked out to date.

Since the initial charge was filed within 6 months of the Company's last best offer, the letter to employees, and the lockout, I find no merit to the Respondent's argument that the charge was untimely under Section 10(b) because the local in 2010 agreed to the concept of casual employees who would receive less compensation than regular employees.

Use of Casuals, Memphis

About 20 casuals were hired at Memphis under the 2010 agreement; 17 of them signed up for union initiation and dues checkoff. By the time of the 2013 negotiations, no casuals were employed at the plant. Respondent's Exhibit 43 contains the time records of casuals, from September 12, 2011, to May 20, 2012. In two or three labor relations meetings in late 2011 and early or mid-2012, the Union expressed concerns about casual employees losing hours as a result of subcontracting. As per the master contract MOA, the Company has contracted out a number of jobs, such as general maintenance, boiler work, plumbing, and electrical work.

The casuals performed a variety of jobs that were also performed by regular employees. They wore the same uniforms, performed the same duties, received the same training, and had the same supervisors as regular employees. Their hours were unrestricted, although they did have scheduling restrictions as per the local agreement (described earlier)—regular employees had to be offered premium paydays or overtime before them, except in five special situations (e.g., funeral leave or jury duty). Unlike regular employees, they had no probationary period before they became permanent employees, but their evaluations were on the same forms.

Other RTECs

None of the parties have contended that the Memphis plant should be treated any differently from its sister RTECs as far as applicability of the Master Agreement vis-à-vis local agreements. According, their local contracts are relevant to determining the issues before me.

I credit the unrebutted testimony of management representatives, Husainali and McPherson, as to Battle Creek, and Muth and Stiltner as to Omaha. For reasons to be stated, I credit Smith only in part as to Lancaster.

Prior to 1999, Battle Creek used casual employees, but the scope of what they could do was substantially expanded in 1999 as a result of the Company closing one of its two Battle Creek facilities. The Company proposed a qualified casual concept, to which the Union agreed in exchange for the Company's agreement to enhanced severance pay and other benefits to employees in the closed plant. Implementation of the new casual concept began in 2000, pursuant to which qualified casuals could perform any job in the facility except skilled trades (a/k/a maintenance).

At Lancaster, the casual concept was first negotiated in the 1981–1983 local agreement.[31] As opposed to the current agreement, it provided that students be given preference to work in the program and contained no cap on the use of casuals. The first local agreement to have a cap was that of 1987–1989, which limited the number of casuals to 30 percent of the total number of regular employees.[32] The cap was raised to 40 percent in the 1998–2001 agreement.[33]

At Omaha, the current local agreement, described below, is the first local contract to contain a casual employee concept.

The most recent Battle Creek supplemental agreement, effective April 3, 2011, to April 5, 2015, contains an MOA regarding utilization of casual employees.[34] The current Lancaster local agreement, effective from October 9, 2011, to October 10, 2014, also has an MOA providing guidelines for utilization of casual employees.[35] The most recent Omaha Supplemental Agreement, effective from May 16, 2010, to May 18, 2014, does not contain the term "casual employee;" rather, section 103 provides for two classifications of "seasonal employees."[36]

At Omaha, after midterm bargaining in March and April 2013, local management and the local union negotiated an MOA, executed on April 4, 2013, concerning seasonal B employees.[37] The MOA modified certain provisions in the Supplemental Agreement, including giving seasonal B employees a 60-day grace period to work in a training capacity, giving them more flexibility in vacation scheduling, and allowing a regular employee to replace a seasonal employee forced to work. It also added a new provision regarding seasonal B employees transitioning to regular employee status; in sum, 40 percent of candidates entering the seasonal B program would be able to apply for regular status on a special track, whereas the remaining 60 percent would have to be hired through the standard hiring process.

The stated purpose of all three of the above provisions is to provide scheduling relief to regular employees. The caps or limits on their use vary: at Battle Creek, 30 percent of the total number of regular nonmaintenance employees; at Lancaster, 40

[28] Ibid.

[29] Jt. Exh. 10.

[30] Jt. Exh. 11. As per sec. 8.02 of the Master Agreement, Chorny on October 20 provided Shelton with formal notice of the Company's intention to lock out unit employees on October 22 if the Union did not agree to its final offer before then. Jt. Exh. 12.

[31] R. Exh. 27 at14–15 (MOA).

[32] R. Exh. 25 at 14.

[33] R. Exh. 23 at 22.

[34] R. Exh. 19 at internally paginated 84–86.

[35] R. Exh. 22 at 32–34.

[36] R. Exh. 29 at 8–10. The seasonal B employees, who can work year-round, are akin to casual employees at the other plants. I will hereinafter in this section refer to them also as casuals. The seasonal A employees are more in the nature of summer hires.

[37] R. Exh. 37; Tr. 547, et. seq.

percent of the total number of regular employees; and at Omaha, not exceeding 20 percent above the bargaining unit work force, excluding maintenance. None of the plants provide casuals with bidding or seniority rights, and their terminations are not subject to the grievance procedure. All of the work performed by casuals is also work performed by regular employees, with whom they work side-by-side and under the same supervisors. There are no restrictions on the number of hours they can work. At Battle Creek and Lancaster, there are no restrictions on how long they can work; at Omaha, however, those who are not also in the seasonal A program can work a maximum of 5 years.

As to pay, casuals at Lancaster are paid $6 an hour less than the operator rate for all work performed, with the exception of employees on the payroll as of September 29, 1996, who retained their wage rate and progression as per a previous local MOA incorporated by reference to the terms of the Master Agreement. At Omaha, the pay rate for casuals is not specifically set out in section 103 but presumably is $6 less an hour as per the Master Agreement.

However, the Battle Creek local agreement provides that the casuals' wage rate is "$6.00 less than the job rate for work performed. Once a job qualification is obtained by the casual employee, the employee is eligible for $3.00 less than the job rate for all work performed." Thus, casuals who are qualified to perform a job receive $3 less than the job rate for regular employees.[38]

Since it has to be assumed that a casual employee would not be assigned to perform a job for which he or she is not qualified, this appears to effectively supersede the $6 an hour less an hour contained in the Master Agreement. The language that nonqualified casuals will receive $6 an hour less an hour appears to be a merely perfunctory acknowledgment of the master's provision. Even assuming a distinction is made in practice, at least some casuals have been paid at a locally-negotiated rate that is different from the amount in the master.

The fringe benefits that casuals receive is not identical at the three plants. At Battle Creek and Lancaster, they do not receive group insurance, vacation pay, or showup pay. However, at Omaha, showup pay is not mentioned as an exclusion.

At Battle Creek, casuals perform any production work for which they are qualified but do not perform skilled trade work (mechanical and electrical). Thus, they work in various positions in the packing, processing, and warehouse departments but not in the mechanical department.

Smith gave confusing and contradictory testimony concerning the nature of the casuals' work at Lancaster, undermining her credibility on that matter. When asked on direct examination what jobs they perform, she replied wastefeed, industrial cleaning, and packaging cereal. On cross-examination by the General Counsel, she testified that their primary function is wastefeed because that is the only function for which they can be trained under the contract but that they no longer perform packaging because those functions have been automated. Then, on cross-examination by Freund, she testified that there currently are no casual employees doing wastefeed and that that none have been trained to do such in the last 5 years.

Based on her final testimony, I find that their primary function is general work not requiring specialized training and that they do not perform any of the other jobs listed on page 57 of the agreement.

At Omaha, seasonal employees perform various functions outside of those defined under maintenance, i.e., in the packing, processing, quality control, and sanitation departments.

At all three plants, the casuals/seasonals (Omaha) cannot be offered overtime until after all regular employees have been offered work, although Omaha has exceptions in which casuals or seasonal A employees can be scheduled before offering overtime or extra work to regular employees. The Battle Creek and Lancaster agreements also provide that regular employees on involuntary layoff also first must be offered overtime, but Omaha does not, at least in section 103 of its local agreement.

Respondent's Exhibit 40 is a summary of the usage of casual employees at Battle Creek from 2000 until approximately May 1, 2014.[39] The yearly total number of casual employees used has varied from 29 in 2001 to 97 in 2008. In roughly the first 4 months of 2014, the number was 45. They worked an average of about 413 hours, or approximately 24 hours a week. Husainali testified without controversion that there are currently 38 or 39 casual employees.

Respondent's Exhibit 35 shows the usage of casual employees at Lancaster from 2007 to approximately May 1, 2014.[40] The yearly number has remained fairly consistent, ranging from 101 in 2007 to 121 in 2009. On the other hand, in 2014, YTD, 118 casuals worked an average of a little over 3 hours per week, considerably less than in any of the prior years.

Respondent's Exhibit 38 shows the utilization of seasonal employees at Omaha from 2007 to approximately May 1, 2014.[41] Since the seasonal B program did not come into effect until 2010, all of the seasonal employees in the preceding years were seasonal A. Prior to 2014, the number ranged from 46 in 2009 to 101 in 2013. In 2014, the number was 16 (all seasonal Bs). They averaged about 67 hours a week.

Alternative crew scheduling is currently in effect for powerhouse employees at Battle Creek and for the boiler generators at Omaha.

Request for Information, October 10 Bargaining Session

As reflected in Joint Exhibit 3, tab K, the Union orally requested information in connection with proposal 7, which gave the Company the unrestricted right to hire nonregular employees, including casuals, and afforded casuals bid rights.

Shelton requested the following:

(1) Total number of bargaining unit employees to be involved in the casual concept.
(2) Total number of hours the casuals worked in the last 3 years.

[38] Tr. 606 (Husainali).

[39] Based on testimony regarding similar summaries for Lancaster and Omaha. The underlying data is contained in R. Exh. 41.

[40] The underlying supporting data is contained in R. Exh. 36.

[41] The underlying supporting data is contained in R. Exh. 39.

(3) Average hours worked for all casuals in the last 3 years on a weekly basis.
(4) Average days worked for casuals in the last 3 years on a weekly basis.
(5) Total number of overtime hours casuals worked in the last 3 years on a weekly basis.
(6) Total number of jobs bid in the previous 3 years.
(7) Total number of employees who were awarded a job in the last 12 months and a copy of the bids.
(8) Total number of employees awarded more than one new job bid in the last 3 years and a copy of it.
(9) A list of what the Company would consider formal discipline that could get someone removed from bidding consideration.
(10) A list of what would not disqualify them from bidding on a job.
(11) What the Company would consider satisfactory attendance, including how many attendance points and what part of the work record the Company would use.
(12) Would the Union be part of the bid eligibility process?
(13) Who would do the job assessment and what guidelines would be used?
(14) Who would conduct the interview and what kinds of questions and guidelines would be used?
(15) A copy of all questions and answers that would be asked during the interview.
(16) Who would make the final decision on who is awarded the job bid, since it would no longer be seniority?
(17) Would FMLA be considered as an attendance factor?
(18) A list of criteria that the Company would use for waiving an interview.

After a management caucus, Chorny told the Union that the Company was withdrawing the proposed provision that an employee who had been issued informal discipline was ineligible to bid; the addition of added criteria (satisfactory attendance, etc.) for awarding bids, including an interview; and the change to awarding three jobs in a calendar year. With those changes, she indicated, the Company's only remaining proposed change to bidding procedures was the inclusion of casuals.

During another caucus, the Company prepared a proposals update[42] which, inter alia, confirmed this. Later, after the Union had reviewed it, the following exchange ensued:[43]

> CHORNY: [W]e are working on our information request. With our proposal changes to the #7 do you still want all that?"
>
> SHELTON: Shit yes, you made me read all of it.
>
> CHORNY: Are you serious?
>
> SHELTON: No. I want the part that is relevant and still on the table.

The parties had no discussion on the information requests at the following (and last) bargaining session held on October 15. That afternoon, Chorny emailed Bradshaw and the local a response to the local's oral information requests of October 9 and 10.[44] Therein, she attached Plant Manager Rook's responses to the following questions:

(1) The total number of bargaining unit employees to be involved in the casual concept.
(2) When the Company would start hiring new casuals if the Company's proposals thereon were implemented.
(3) Average hours the casuals worked in the last 3 years on a weekly basis.
(4) Average days the casuals worked in the last 3 years on a weekly basis.
(5) Total number of overtime hours casuals worked in the last 3 years on a weekly basis.

The General Counsel does not contend any deficiencies in the Company's responses to those requests. As stated in the complaint, and as conceded by the Respondent, the Company did not provide the following information:

(6) The total number of jobs bid in the plant in the previous 3 years.
(7) The total number of employees who were awarded a job in the past 12 months and a copy of the bids.
(8) The total number of employees awarded more than one new job bid in the last 3 years and a copy of the bids.
(16) Who would make the final decision on who is awarded the job bid.

The local voiced no dissatisfaction with what Rock provided and did not renew its request for the above information that remained unfurnished. The Company has never provided such information or raised any reasons to the local for not doing so. At trial, company witnesses contended that on October 15 Shelton withdrew all information requests related to bidding, but none of them questioned the accuracy of what the bargaining notes reflect he said: "I want the part that is relevant and still on the table." Indeed, Chorny confirmed that he made that statement, and she conceded that the bidding proposal remained on the table inasmuch as the Company continued to seek to confer bidding rights on casuals.[45]

Analysis and Conclusions

The Respondent's Declaration of Impasse and Lockout of Employees

The Respondent made it abundantly clear, from the outset of negotiations, that the primary purpose of its casual employee and alternative crew scheduling proposals was to reduce labor costs, including overtime pay, and the Union had legitimate concerns about the impact that such proposals would have on the bargaining unit, particularly on the regular work force.

[42] Jt. Exh. 4(h).
[43] Jt. Exh. 3, tab K at 13.
[44] Jt. Exh. 8. She referenced oral requests of October 9 and 10, but only the latter are before me.
[45] Tr. 188.

Indeed, the Respondent's witnesses conceded that, if adopted, its casual employee proposal could theoretically result in all new hires in the future being casuals, with a concomitant erosion of the number of the regular employees, who eventually could be entirely replaced by casuals.

However, my role is not to judge the merits of the Company's proposals or the reasonableness of the Union's response. The issue before me is whether the proposals were proposed modifications to the Master Agreement, and therefore midterm modifications over which the Union had no obligation to bargain, or were proposals going to the renegotiation of the local agreement and therefore mandatory subjects of bargaining. The answer determines the legality of the Company's declaration of impasse, letter to employees, and subsequent lockout.

For the following reasons, I conclude that the Respondent's proposals on the casual employee program and alternative crew scheduling were matters that did not contravene the terms of the Master Agreement and which have been the subjects of local RTEC plant agreements. That the proposals impacted on regular employees' remuneration in terms of reduced overtime hours does not equate to their conflicting with the Master Agreement, which neither sets out priorities for offering overtime nor guarantees it to regular employees. Indeed, the master agreement recognizes the concept of continuous crewing, which it leaves to local bargaining. Granted, the Union had an understandable fear that the proposals, taken together, would cause a reduction in the regular work force—even its potential future elimination as a result of ongoing hiring only of casual employees. However, this does not change the fact that the proposals concerned subjects that were properly the subjects of local bargaining; proposals over which the Union could have sought to negotiate terms more favorable to regular employees but did not.

I. LEGAL FRAMEWORK

An employer and the representative of its employees are obliged to bargain in good faith on mandatory subjects of bargaining but are not required to do so on nonmandatory subjects. *NLRB v. Wooster Division,* 356 U.S. 342, 349 (1958). If an employer proposes nonmandatory subjects, it cannot insist upon them as a condition of any agreement. Ibid; *Smurfit-Stone Container Enterprises,* 357 NLRB No. 144, slip op. at 1 (2011). Nor can it insist to a point of impasse on inclusion of such subjects in a contract. Id.; *ServiceNet, Inc.,* 340 NLRB 1245, 1245 (2003).

Under Section 8(d) of the Act, 29 U.S.C.§ 158(d), when a collective-bargaining agreement is in effect, a party is under no obligation to consent, or even to discuss, the other party's proposed midterm modification of a contractual term, unless the agreement contains a reopener provision, i.e., a provision that a party can open up such subject for bargaining prior to the agreement's expiration. *Smurfit-Stone,* id., slip op. at 2; *Boeing Co.,* 337 NLRB 758, 762–763 (2002). In the absence of a reopener provision, such a proposal is deemed a nonmandatory subject of bargaining. *Smurfit-Stone,* id.; *New Seasons, Inc.,* 346 NLRB 610, 617–618 (2006).

There is no question that if the Master Agreement covered the subjects that the Respondent's proposals sought to change—use of casual employees and alternative crew scheduling—then those proposals sought midterm modifications, for which the Union was not required to bargain, and over which the Respondent could not declare an impasse when the parties failed to reach agreement thereon. If the declaration of impasse was unlawful, ergo the resulting lockout was also unlawful.

Relying on *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007), the Respondent contends that the topics of casual employees and alternative crew scheduling were mandatory subjects of bargaining at local level negotiations because, at the master negotiations level, the Respondent never clearly and unmistakably waived the right to bargain over them locally. I agree with the General Counsel that the Respondent's reliance on the clear and unmistakable waiver standard is misplaced. In *Provena,* the Board found nothing in the express provisions of the agreement or in the bargaining history to establish that the labor organization waived the right to bargain over incentive pay and that the employer's unilateral change therein therefore violated Section 8(a)(5) and (1). Thus, the union had a right to bargain unless such right had been waived. Here, in contrast, the issue is whether the Respondent's proposals sought midterm modifications of the master agreement. If so, then the Respondent had no right to insist to impasse on them and thus no waiveable "right" existed.

II. MASTER CONTRACT PROVISIONS

Sections 1.01 and 1.02 essentially set out a dual-bargaining system, pursuant to which a Master Agreement covers all four RTEC's, each of which has its own local agreement. Section 101(c) provides that the Master Agreement covers only those matters specifically included therein but that the provisions of the Master Agreement will prevail in the event of any conflicting provision in a local agreement. Section 101(a) leaves the definition of "employees" to each local agreement, and section 1.02 provides that local agreements shall continue those matters that the parties have are agreed to be negotiated separately at the local level.

By the very terminology of sections 1.01 and 1.02, a determination must be made of whether the Respondent's casual employee and alternative crew proposals amounted to proposed midterm changes to the master agreement, or were mandatory subjects of bargaining for the successor Memphis local contract.

Section 101(f) provides:

> Those matters which have been covered by provisions in this Agreement shall not, unless the parties thereto agree, be subject to negotiation between the Company and any of the respective Local Unions in an effort to secure changes in or to secure a new Supplemental Agreement. Those matters covered by provisions in a Supplemental Agreement shall not, unless the parties thereto agree, be subject to negotiation between the Company and the International Union in an effort to secure changes in or a new version of this Agreement.

As the Board stated in *Michigan Bell Telephone Co.*, 306 NLRB 281, 282 (1992):

> In general, a zipper clause is an agreement by the parties to preclude further bargaining during the term of the contract . . .

> .[T]he result will be that neither party can force the other party to bargain, during the term of the contract, about matters encompassed by the clause.

There is no one standard version for a zipper clause, and the parties can decide its scope. When determining whether a contractual provision constitutes a waiver of bargaining rights, the test is that set out by the Supreme Court in *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 709 (1983):

> [W]e will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the understanding is "explicitly stated." More succinctly, the waiver must be clear and unmistakable. [460 U.S. at 709.]

This clear and unmistakable waiver test applies equally to alleged waivers contained in zipper clauses as it does to those contained in other contractual provisions. *Michigan Bell Telephone,* ibid. If the language of the clause is ambiguous, i.e., subject to an interpretation that it does not preclude bargaining over the subject at issue, waiver will not be found. Ibid; cf. *Mead Corp.*, 318 NLRB 201, 202 (1995).

The General Counsel contends that section 1.01(f) of the master contract is a zipper clause that operated to privilege the local not to bargain over the Respondent's proposals concerning expanded use of casuals and alternative crew scheduling, since they proposed midterm reductions in employee wages and other compensation. On the other hand, the Respondent argues that, whether or not section 1.01(f) is characterized as a zipper clause, it did not constitute a clear and unmistakable waiver of the right to bargain over expanded use of casuals and alternative crew scheduling in Memphis local negotiations.

Because section 1.01(f) distinguishes between matters covered by provisions in the Master Agreement and matters covered in a Supplemental Agreement, we go back to the fundamental question of whether the proposals on expanded use of casual employees and alternative crew scheduling related to subjects encompassed by the Master Agreement or to matters governed by the local agreements.

III. CASUAL EMPLOYEES

In the Master Agreement, section 5.01 and the Wage Appendix provide for a folded-in COLA; a new hire progression schedule for regular employees; wage rates for seasonal employees (Omaha); and, with certain specified exceptions, a pay rate of $6 less an hour for nonregular employees, such as temporary and casual employees. However, the Wage Appendix does not contain any hourly pay rates for any classifications, which are negotiated at the local level, as are wage rates for new classifications added in the Master Agreement.

The Respondent brought up expansion of the casual employee program and alternative crewing at master negotiations in 2005, 2009, and 2012, but the Union would not agree to them, and the Respondent withdrew them. However, at no time was there any agreement or understanding that local negotiations on those subjects was precluded by the Master Agreement.

Turning to the local agreements, section 106 of the 2010 Memphis Supplemental Agreement deals with student employees, a classification not mentioned in the Master Agreement. Inter alia, it describes the criteria they must meet for employment, specifically states that they are not regular hourly employee and receive limited benefits, and limits when they can be used. Thus, this classification and its parameters was the creation of local negotiations.

Section 107 is the casual program. It provides, inter alia, that they are limited to 30 percent of the total number of regular employees, and receive only enumerated limited fringe benefits. Most significantly, paragraph F provides that their wage rate is 70 percent of the qualified rate for the first year and 80 percent of the qualified rate starting the second year. This wage rate conflicts with the $6-less-an-hour provision in the Master Agreement, on its face and as Chorny testified. The result is that local negotiations on this matter effectively superseded the Master Agreement's terms.

In the other RTEC plants, the terminology for nonregular employees varies: Battle Creek references casuals, temporary replacement employees, and seasonal employees; Lancaster has casuals and seasonals; and Omaha has two classifications of seasonal employees but no employees termed casual.

The cap on casual employees also varies by plant: 30 percent at Battle Creek, 40 percent at Lancaster, and 20 percent (for seasonal B) at Omaha. At Lancaster, there originally was no cap when the casual program was first instituted under the 1981–1983 agreement. The first local agreement to have a cap was that of 1987–1989, which limited the number of casuals to 30 percent of the total number of regular employees. The cap was raised to 40 percent in the 1998–2001 agreement. Therefore, the degree to which the Company can use casual employees vis-à-vis regular employees has been a matter solely for local negotiations.

The wage rates for casuals are $6 less an hour, as per the Master Agreement, at Lancaster (with the exception of certain grandfathered employees), and the same apparently holds true for seasonals at Omaha. However, at Battle Creek, at least some of the casuals are paid $3 less an hour, as the language of the local contract and Husainali's testimony reflect. Thus, as with Memphis, local negotiations have overridden the pay provision for casuals contained in the Master Agreement.

The plants also differ on how casuals are scheduled vis-à-vis regular employees and the degree to which they have been utilized, both annually and in total hours. Thus, in the first few months of 2014, Battle Creek had 38 or 39 casuals, averaging approximately 24 hours of work a week; Lancaster 118 casuals, averaging about 3 hours a week; and Omaha 16 casuals, averaging 67 hours a week.

Summary

As far as casual employees, the Master Agreement contains little, other than the provision that they be paid $6 less an hour than the hourly rate of regular employees. Significantly, both at Memphis and Battle Creek, local representatives negotiated and implemented different pay rates for casuals, thereby not complying with the 101.1(c) provision that in the events of conflicts in provisions between the Master Agreement and a local agreement, the former would prevail. Clearly, local negotiators through the years have determined the scope and operation of the casual employee program at their respective plants,

including their hiring, training, and assigned duties. Thus, varying caps have been negotiated locally, and the use of casuals has varied greatly among the plants and fluctuated from year to year. In sum, use of casual employees, and their terms and conditions of employment, has been primarily a matter for local negotiations throughout the years, as well reflected by the April 4, 2013 MOA at Battle Creek.

IV. ALTERNATIVE CREWING

The Master Agreement nowhere mentions the term "alternative crewing." The only pertinent provision is section 5.04, which addresses overtime for hours worked in excess of the normal workday and on Saturday and Sunday, and sets out an exception for an employee working in a department that normally operates 7 days per week. Subparagraph (d) specifically provides that all other matters pertaining to overtime pay are excluded from the agreement and specifically reserved to negotiation in local agreements. The Master Agreement does not guarantee regular employees any particular schedule or a minimum amount of overtime. Two of the RTEC's have locally negotiated continuous crewing for boiler operators, and overtime policies are not identical among the four plants.

Summary

The Master Agreement recognizes the concept of continuous weekly operation and that the implementation of overtime practices is primarily a matter for local negotiations, and local negotiations at two plants have resulted in the implementation of continuous operation scheduling for boiler operators. Thus, alternative crew scheduling has been tacitly recognized as a subject for local bargaining, even though it may overlap with provisions in the master relating to overtime.

V. CONCLUSIONS

Based on the above factors, and the record as a whole, I conclude that the Respondent's proposals for an expanded casual employees program and for alternative crewing were topics that came under the local agreement, and not proposals for midterm modifications of the Master Agreement. Therefore, they were mandatory subjects of bargaining in the 2013 Memphis local negotiations.

Impasse occurs "after good faith negotiations have exhausted the prospects of concluding an agreement." *Sacramento Union,* 291 NLRB 552, 554 (1988); *Taft Broadcasting Co.,* 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). Whether impasse exists is a matter of judgment, and considers factors such as the bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations. Ibid. Only when there has been a complete breakdown in the entire negotiations, is the employer free to implement its last, best, and final offer. *Sacramento Union,* above at 554.

On October 15, after numerous bargaining sessions, the Union unequivocally expressed its unwillingness to negotiate over the two proposals, the parties agreed that they were at an impasse over them, and the Union walked out of the meeting.

Based on the above, I conclude that there was a bona fide impasse reached due to the Union's refusal to negotiate proposals that were mandatory subjects of bargaining. I therefore further conclude that the Respondent properly declared impasse, timely notified the Union of its demands so that the Union could evaluate whether to accept them and prevent a lockout,[46] properly notified employees of a pending lockout if no agreement was reached, and then legally locked them out. See *American Ship Building Co. v. NLRB,* 380 U.S. 300, 310–313 (1965); *Boehringer Ingelheim Vetmedica,* above.

The Information Requests

An employer is obliged to supply information requested by a collective-bargaining representative that is necessary and relevant to the latter's performance of its responsibilities to the employees it represents. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). Generally, an employer has to either supply the information or explain its reasons for noncompliance. *Columbia University,* 298 NLRB 941, 945 (1990), citing *Ellsworth Sheet Metal, Inc.,* 232 NLRB 109 (1977). The Respondent here did neither, relying on what it contends was the local's withdrawal of information requests pertaining to the Company's proposals to change bidding procedures.

On October 10, after Shelton's oral requests for information, Chorny advised the local that the Company was withdrawing all proposed changes to the agreement's bidding provisions except for conferral of bidding rights on casual employees, which it was continuing to pursue. That obviously could have a great negative impact on regular employees.

Chorny then stated that the Company was working on the local's information request, and asked, "With our proposal changes to the #7 do you still want all that?" Shelton replied, "No. I want the part that is relevant and still on the table." Chorny's question was somewhat ambiguous, as was Shelton's answer. Since the Company was continuing to propose a major change in the bidding process by including casual employees, the information requests pertaining to bidding would reasonably be considered "relevant and still on the table." In any event, if the Company was not clear whether the local still desired that information, it was the Company's obligation to either comply or request clarification. See *National Steel Corp.,* 335 NLRB 747, 748 (2001); *Keahou Beach Hotel,* 298 NLRB 702 (1990), enfd. 324 F.2d 928 (7th Cir. 2003). The Respondent failed to do so.

Accordingly, I conclude that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the local union with information on job bidding that it orally requested on October 10.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

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[46] See *Dayton Newspapers,* 339 NLRB 650, 656 (2003), enfd. in relevant part 402 F.3d 651 (6th Cir. 2005); *Boehringer Ingelheim Vetmedica,* 350 NLRB 678, 679 (2007).

3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(5) and (1) of the Act: failed and refused to provide the local union with information on job bidding that it requested on October 10.

REMEDY

Because I have found that the Respondent has engaged in certain unfair labor practices, I will order it to cease and desist and to take certain affirmative action designed to effectuate the Act's policies.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[47]

ORDER

The Respondent, Kellogg Company, Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to provide the local union with information that it requests that is necessary and relevant to the performance of its role as the collective-bargaining representative of employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Timely furnish the local union with the information that it requested about job bidding.

(b) Within 14 days after service by the Region, post at its facility in Memphis, Tennessee, copies of the attached notice marked "Appendix."[48] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet set, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. The Respondent shall also mail a copy of the signed notice to each of the locked out employees at his or her last known address.[49] In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 10, 2013.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 7, 2014

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE recognize Bakery, Confectionary, Tobacco Workers and Grain Millers International Union and its Local 252-G (the Union) as the bargaining representative of employees described in our 2010–2013 collective-bargaining agreement.

WE WILL NOT fail and refuse to provide the Union with information that it requests that is necessary and relevant to the performance of its role as the collective-bargaining representative of employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act, as set forth at the top of this notice.

WE WILL provide to the Union information that it requested about job bidding during negotiations on October 10, 2013 for a new collective-bargaining agreement.

KELLOGG COMPANY

[47] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[48] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[49] See *Allbritton Communications, Inc.,* 271 NLRB 201 (1984), enfd. 766 F.2d 812 (3d Cir. 1985), cert. denied 474 U.S. 1081 (1986).

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/15-CA-115259 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.